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Page 1

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

IN RE: NATIONAL)	MDL No. 2804
PRESCRIPTION OPIATE)	
LITIGATION)	Case No.
)	1:17-MD-2804
)	
THIS DOCUMENT RELATES TO)	Hon. Dan A.
ALL CASES)	Polster
)	

— — —
Wednesday, May 29, 2019
— — —

HIGHLY CONFIDENTIAL - SUBJECT TO FURTHER
CONFIDENTIALITY REVIEW
— — —

Videotaped Deposition of DANIEL P.
KESSLER, JD, Ph.D., held at Jones Day,
1755 Embarcadero Road, Palo Alto, California,
commencing at 9:02 a.m., on the above date,
before Debra A. Dibble, Registered Diplomate
Reporter, Certified Realtime Reporter,
Certified Realtime Captioner, and Notary
Public.

— — —
GOLKOW LITIGATION SERVICES
877.370.3377 ph | fax 917.591.5672
deps@golkow.com

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Page 2	Page 4
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Page 3	Page 5
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2 (Pages 2 to 5)

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Page 6	Page 8
<p>1 PROCEEDINGS. 2 (May 29, 2019 at 9:02 a.m.) 3 THE VIDEOGRAPHER: Good 4 morning. We are now on the record. 5 My name is Darnell Brown, and I'm the 6 videographer with Golkow Litigation 7 Services. Today's date is May 29, 8 2019, and the time is 9:02 a.m. 9 This video deposition is being 10 held in Palo Alto, California, in the 11 matter of In Re: National Prescription 12 Opiate Litigation for the 13 United States District Court for the 14 Northern District of Ohio. 15 The deponent is Daniel Kessler. 16 Counsel, please identify 17 yourselves for the record. 18 MR. KO: Good morning, 19 everyone. David Ko of Keller Rohrback 20 on behalf of the MDL plaintiffs. 21 MR. GEISE: Steve Geise from 22 Jones Day on behalf of Walmart and the 23 witness. 24 MS. CASTLES: Claire Castles on</p>	<p>1 Professor, where do you 2 currently reside? 3 A. In Stanford, California. 4 Q. Okay. And how long have you 5 lived here? 6 A. At my Stanford address, ten 7 years. 8 Q. Okay. And is that your 9 permanent residence? 10 A. Yes. 11 Q. Do you have any other 12 residences? 13 A. No. 14 Q. All right. And I know you've 15 been deposed before, but let me just go over 16 a few ground rules that are important to me. 17 Debbie, the court reporter here, has what I 18 believe is the most important job in 19 transcribing everything, so it's very 20 important that we don't talk over each other. 21 So please wait until I finish my question 22 before you move on to your answer; and 23 likewise, I'll try to wait until you finish 24 your response before I move on to my next</p>
Page 7	Page 9
<p>1 behalf of Walmart and the witness. 2 MR. BREWER: Matt Brewer of 3 Bartlit Beck on behalf of Walgreens. 4 MS. KIM: Mary Kim of Dechert 5 on behalf of Purdue. 6 MR. LEIGH: Daniel Leigh from 7 O'Melveny & Myers on behalf of Janssen 8 defendants. 9 MR. PULSIPHER: Bryant 10 Pulsipher from Covington & Burling on 11 behalf of McKesson. 12 DANIEL P. KESSLER, JD, Ph.D., 13 having first been duly sworn, was examined 14 and testified as follows: 15 DIRECT EXAMINATION 16 BY MR. KO: 17 Q. Good morning. Before we begin, 18 Dr. Kessler, do you prefer to go by 19 Dr. Kessler, Professor Kessler? Daniel? 20 Dan? Mr. Kessler? 21 A. Whatever you'd like. I'm 22 pretty easy. 23 Q. Okay. Great. We'll go with 24 Professor Kessler and see how that goes.</p>	<p>1 question. 2 Does that sound good? 3 A. Yes. 4 Q. Great. And to the extent I do 5 ask a yes-or-no question and your answer is, 6 in fact, "yes" or "no," please do respond in 7 that manner rather than simply shaking your 8 head or nodding your head. 9 Is that okay? 10 A. Yes. 11 Q. Great. From time to time 12 counsel at this table may object to my 13 questioning, including your counsel. Unless 14 they clearly instruct you not to answer, I'd 15 request that you nevertheless answer my 16 question. 17 Does that sound fair? 18 A. Yes. 19 Q. Great. 20 If at any point in the day you 21 feel like you need a break, please request 22 one and I'll do my best to accommodate. 23 Okay? 24 A. Okay.</p>

3 (Pages 6 to 9)

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<p style="text-align: right;">Page 10</p> <p>1 Q. Is there anything you can think 2 of, Professor, that will prevent you from 3 testifying truthfully or honestly today? 4 A. No. 5 Q. Great. Professor Kessler, did 6 you prepare for this deposition today? 7 A. Yes. 8 Q. And what did you do to prepare? 9 MR. GEISE: Just let me 10 interject. I don't think he's asking 11 for any communications that you had 12 with counsel about that. So if you 13 can answer without disclosing those 14 communications, you're free to. 15 THE WITNESS: Of course. 16 I met with Mr. Geise and 17 Ms. Castles yesterday, and I reviewed 18 my report and other case documents 19 over the weekend. 20 Q. (BY MR. KO) And with respect 21 to your meeting yesterday, how long did that 22 last? 23 A. About six or seven hours. 24 Also, I should say also at the meeting were</p>	<p style="text-align: right;">Page 12</p> <p>1 prepare for the deposition? 2 A. No. 3 Q. And at this meeting last 4 Thursday, were counsel present? 5 A. No. 6 Q. Okay. And so what did you 7 discuss with those two individuals in 8 preparation for this deposition? 9 A. We discussed the data analysis 10 conducted under my direction for this report. 11 Q. Okay. 12 A. And the literature underlying 13 the report. 14 Q. In addition to generally the 15 data analysis supporting your report and the 16 literature referenced in your report, did you 17 speak with them about anything else in 18 connection with this deposition today? 19 A. No. 20 Q. Okay. Approximately how many 21 hours would you say that you have spent 22 preparing for this deposition? 23 A. Less than 20. Between 15 and 24 20.</p>
<p style="text-align: right;">Page 11</p> <p>1 Mike DeCesaris and Brianna Cardiff-Hicks from 2 Cornerstone Research. 3 Q. Okay. In addition to meeting 4 with individuals at Cornerstone, who I 5 understand assisted you with this report, and 6 Mr. Geise and Ms. Castles, have you met with 7 anyone else to prepare for this deposition 8 today? 9 A. No. 10 Q. And was the session, the 11 preparation session yesterday, the only prep 12 that you had with other individuals other 13 than going through the report as you said on 14 your own and going through other documents? 15 A. Oh, I actually also met with 16 Mr. DeCesaris and Ms. Cardiff-Hicks last 17 Thursday for a couple of hours. 18 Q. Okay. And where was that 19 meeting? 20 A. At Cornerstone Research in 21 Menlo Park. 22 Q. And in addition to meeting with 23 them in person, did you ever have any 24 communication with them over the telephone to</p>	<p style="text-align: right;">Page 13</p> <p>1 Q. And approximately six or seven 2 of those were with counsel and the balance of 3 that was without counsel; is that accurate? 4 A. Yes. 5 Q. Okay. Great. 6 Now, you mentioned a moment ago 7 that you reviewed some documents in 8 connection with preparing for this 9 deposition. Can you describe to me what 10 documents that you reviewed? 11 MR. GEISE: And again, if it's 12 a document that counsel showed you or 13 talked to you about, I'd ask you not 14 to answer on that. If it's a document 15 you looked at with -- in meetings and 16 counsel wasn't present, you're 17 certainly free to disclose that. 18 THE WITNESS: All the documents 19 that I reviewed were documents that I 20 discussed with counsel. 21 Q. (BY MR. KO) Okay. And so were 22 those all documents that were provided to you 23 by counsel? 24 MR. GEISE: Objection, form.</p>

4 (Pages 10 to 13)

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<p style="text-align: right;">Page 14</p> <p>1 THE WITNESS: No.</p> <p>2 Q. (BY MR. KO) How did you obtain</p> <p>3 these documents to review?</p> <p>4 A. Some of them were provided by</p> <p>5 counsel. Some of them I had found and some</p> <p>6 of them were found or produced by the</p> <p>7 Cornerstone people.</p> <p>8 Q. Okay. Well, let's talk about</p> <p>9 the documents that you said you had found.</p> <p>10 How did you find those documents?</p> <p>11 A. As part of my literature review</p> <p>12 and study of this issue.</p> <p>13 Q. Okay. And what about with</p> <p>14 respect to the documents that were found or</p> <p>15 produced by the Cornerstone people? How do</p> <p>16 you know -- or how did they obtain those</p> <p>17 documents?</p> <p>18 A. Some of those documents they</p> <p>19 obtained through literature review or study.</p> <p>20 Some of those documents they produced as a</p> <p>21 result of data analysis conducted under my</p> <p>22 direction.</p> <p>23 Q. Okay. Now, I understand that</p> <p>24 you've listed materials that you've</p>	<p style="text-align: right;">Page 16</p> <p>1 his opinions that was provided by</p> <p>2 counsel, you would like to talk about</p> <p>3 that. But if it's something he's not</p> <p>4 relying on and is not relevant to his</p> <p>5 opinions, then you're not asking about</p> <p>6 that?</p> <p>7 MR. KO: We can certainly start</p> <p>8 with the former.</p> <p>9 MR. GEISE: Okay.</p> <p>10 Q. (BY MR. KO) So let me ask you</p> <p>11 again, to be clear.</p> <p>12 I understand that you have</p> <p>13 indicated that you have considered certain</p> <p>14 documents in your expert report; correct?</p> <p>15 A. Yes.</p> <p>16 Q. Are there any documents that</p> <p>17 you have reviewed in preparation for this</p> <p>18 deposition that are not listed in appendix --</p> <p>19 in the appendix in your expert report for</p> <p>20 which you say you've considered those</p> <p>21 materials?</p> <p>22 A. I haven't reviewed any</p> <p>23 documents that are relevant to my opinions</p> <p>24 that are not listed in the report.</p>
<p style="text-align: right;">Page 15</p> <p>1 considered in preparing your report in the</p> <p>2 appendix of your expert report. Can you</p> <p>3 think of any documents that you reviewed in</p> <p>4 connection with preparing for this deposition</p> <p>5 that are not listed in that appendix?</p> <p>6 A. Yes.</p> <p>7 Q. Okay. Which documents are</p> <p>8 those?</p> <p>9 MR. GEISE: Again, same</p> <p>10 instruction. If it's a document that</p> <p>11 was provided to you or showed to you</p> <p>12 by counsel, I'd claim privilege on</p> <p>13 that. But if it's something outside</p> <p>14 of that, you can answer.</p> <p>15 MR. KO: Well, I'd actually</p> <p>16 like to interject for a moment. To</p> <p>17 the extent the documents were --</p> <p>18 contained facts or data or certain</p> <p>19 assumptions that counsel provided to</p> <p>20 you, I'd actually ask you to respond</p> <p>21 and answer.</p> <p>22 MR. GEISE: Just to clarify, if</p> <p>23 you're asking if there was a document</p> <p>24 that he is relying on for purposes of</p>	<p style="text-align: right;">Page 17</p> <p>1 Q. I see. So every document --</p> <p>2 well, strike that.</p> <p>3 Just so the record is clear,</p> <p>4 you have reviewed certain documents in</p> <p>5 connection with preparing for this</p> <p>6 deposition; correct?</p> <p>7 A. Well, I'm not -- I'm not sure</p> <p>8 I'd say that. I have reviewed other</p> <p>9 documents related to this matter that are not</p> <p>10 listed in the appendix to my report, but</p> <p>11 none -- none of them -- I didn't review them</p> <p>12 specifically in preparation for this</p> <p>13 deposition, and none of them are relevant to</p> <p>14 the opinions I express in my report. Any</p> <p>15 opinion I express in my report relies only on</p> <p>16 the documents in the report.</p> <p>17 Q. Okay. And so a moment ago or</p> <p>18 earlier this morning when you described that</p> <p>19 you had reviewed certain documents before</p> <p>20 today, all of the documents that you rely</p> <p>21 upon in forming your opinions and that</p> <p>22 support your report are contained in the</p> <p>23 appendix in your expert report; is that</p> <p>24 correct?</p>

5 (Pages 14 to 17)

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Page 18	Page 20
<p>1 A. Yes.</p> <p>2 Q. Great.</p> <p>3 I'd like to go ahead and direct</p> <p>4 your attention to the exhibit that's in front</p> <p>5 of you.</p> <p>6 (Whereupon, Deposition Exhibit</p> <p>7 Kessler-1, Plaintiffs' Notice of Oral</p> <p>8 Videotaped Expert Deposition of Daniel</p> <p>9 Kessler, was marked for</p> <p>10 identification.)</p> <p>11 MR. KO: It's been marked as</p> <p>12 Exhibit 1. And I've set some extra</p> <p>13 copies right there for counsel.</p> <p>14 Q. (BY MR. KO) Have you seen</p> <p>15 this --</p> <p>16 MR. GEISE: And, Counsel,</p> <p>17 before you -- let me just, for the</p> <p>18 record, pose an objection to the -- to</p> <p>19 Exhibit 1 which is the Plaintiffs'</p> <p>20 Notice of Oral Videotaped Expert</p> <p>21 Deposition of Daniel Kessler.</p> <p>22 Professor Kessler has complied</p> <p>23 with both the Court's Case Management</p> <p>24 Order No. 1 and Federal Rules of Civil</p>	<p>1 you not to answer.</p> <p>2 Q. (BY MR. KO) I want to turn</p> <p>3 your attention to the second item in that</p> <p>4 notice. And I know you've not -- you haven't</p> <p>5 seen it before, but I'd just like to ask you</p> <p>6 about a couple of things relevant to that</p> <p>7 point.</p> <p>8 Go ahead and read the second</p> <p>9 bullet in that notice.</p> <p>10 A. I've read it. I understand.</p> <p>11 Q. Okay. Do you have -- separate</p> <p>12 and apart of what's requested in that notice,</p> <p>13 do you have an itemization of hours that</p> <p>14 you've spent in this case?</p> <p>15 A. Not with me today, but I -- I</p> <p>16 have sent the counsel and the client an</p> <p>17 itemization of ours, yes.</p> <p>18 Q. Okay. So do you have -- you</p> <p>19 have invoices that you have submitted to, as</p> <p>20 you say, counsel and the client regarding the</p> <p>21 hours that you've spent in this matter;</p> <p>22 correct?</p> <p>23 A. Yes.</p> <p>24 Q. And you didn't -- so the record</p>
Page 19	Page 21
<p>1 Procedure 26 in particular with regard</p> <p>2 to his production of documents. You</p> <p>3 can certainly ask him any questions</p> <p>4 about the subject matter enumerated in</p> <p>5 Exhibit A of the deposition notice</p> <p>6 Exhibit 1, but Professor Kessler</p> <p>7 doesn't have any further production</p> <p>8 and has no obligation to do so.</p> <p>9 Q. (BY MR. KO) Professor Kessler,</p> <p>10 have you reviewed this document -- or have</p> <p>11 you seen this document before?</p> <p>12 A. No.</p> <p>13 Q. Okay. So counsel didn't</p> <p>14 provide you with this notice?</p> <p>15 A. No. Counsel -- counsel</p> <p>16 mentioned it to me and described it in</p> <p>17 general terms, but I didn't get a copy.</p> <p>18 Q. Okay. And what did they --</p> <p>19 what did counsel mention to you about this</p> <p>20 particular exhibit?</p> <p>21 MR. GEISE: And I would object</p> <p>22 to the extent you're asking for</p> <p>23 communications from counsel. I</p> <p>24 believe that's privileged. Instruct</p>	<p>1 is clear, you didn't bring those invoices or</p> <p>2 an itemization of those hours to this</p> <p>3 deposition today; correct?</p> <p>4 A. No.</p> <p>5 Q. Why not?</p> <p>6 A. I didn't think I needed to. I</p> <p>7 wasn't aware that I was supposed to.</p> <p>8 MR. KO: Okay. And I would</p> <p>9 just note for the record that, in</p> <p>10 connection with Mr. Geise's objection</p> <p>11 to this notice, that we obviously</p> <p>12 reserve the right to seek the invoices</p> <p>13 and question Professor Kessler on them</p> <p>14 at the appropriate time.</p> <p>15 MR. GEISE: And you're</p> <p>16 certainly free to question</p> <p>17 Professor Kessler about his</p> <p>18 itemization of hours spent and</p> <p>19 compensation paid throughout the</p> <p>20 deposition today, absent the invoices</p> <p>21 themselves.</p> <p>22 Q. (BY MR. KO) Now, a moment ago,</p> <p>23 you said you provided the invoice to counsel</p> <p>24 and to the client.</p>

6 (Pages 18 to 21)

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Page 22	Page 24
<p>1 And which client in particular</p> <p>2 did you provide those to?</p> <p>3 A. Walmart.</p> <p>4 Q. Okay. Any other entities that</p> <p>5 you've provided your invoices to?</p> <p>6 A. No.</p> <p>7 Q. Okay. Do you provide any</p> <p>8 invoices to or through Cornerstone?</p> <p>9 A. Oh, I may have given a copy of</p> <p>10 one of the earlier invoices to Cornerstone.</p> <p>11 Initially, they were going to process them to</p> <p>12 Walmart for me, but that's not the way it's</p> <p>13 turned out. I've now just sent -- Walmart</p> <p>14 had always been paying me directly, and</p> <p>15 Cornerstone was just essentially handing them</p> <p>16 the invoice. But that didn't really work for</p> <p>17 anyone, so now I just send them to Walmart</p> <p>18 directly.</p> <p>19 Q. And approximately when was</p> <p>20 that, when you first provided an invoice to</p> <p>21 Cornerstone to facilitate to Walmart?</p> <p>22 A. I don't remember. It was a --</p> <p>23 maybe three or six months ago.</p> <p>24 Q. Okay. Now, going back to the</p>	<p>1 MR. KO: Again, there's a copy.</p> <p>2 Probably not a sufficient amount of</p> <p>3 copies, but there are copies on the</p> <p>4 table for counsel.</p> <p>5 Q. (BY MR. KO) And Professor</p> <p>6 Kessler, does this document look familiar to</p> <p>7 you?</p> <p>8 A. Yes.</p> <p>9 Q. And this is a copy of the</p> <p>10 complete expert report with appendices that</p> <p>11 you are -- that you have submitted in this</p> <p>12 case; correct?</p> <p>13 A. Yes.</p> <p>14 Q. And does this contain all of</p> <p>15 the opinions you intend to offer in this</p> <p>16 case?</p> <p>17 A. No. Not necessarily.</p> <p>18 Q. Okay. Well, why is that the</p> <p>19 case?</p> <p>20 A. There are at least two classes</p> <p>21 of opinions that I may offer subsequent to</p> <p>22 this report.</p> <p>23 Q. Okay. Can you describe those</p> <p>24 two classes?</p>
Page 23	Page 25
<p>1 notice that's in front of you, there is also</p> <p>2 a request regarding your CV at No. 3.</p> <p>3 Do you see that?</p> <p>4 A. Yes.</p> <p>5 Q. And I know that you've</p> <p>6 disclosed your CV in connection with your</p> <p>7 expert report. Is the CV that's listed in</p> <p>8 your expert report the most updated CV that</p> <p>9 you have?</p> <p>10 A. Yes.</p> <p>11 Q. Okay. Great.</p> <p>12 And just so the record is</p> <p>13 clear, do you -- did you bring any documents</p> <p>14 to this deposition today?</p> <p>15 A. No.</p> <p>16 Q. Great.</p> <p>17 I'd now like to turn your</p> <p>18 attention to what's been marked as Exhibit 2.</p> <p>19 (Whereupon, Deposition Exhibit</p> <p>20 Kessler-2, 5-10-19 Expert Report of</p> <p>21 Daniel P. Kessler, was marked for</p> <p>22 identification.)</p> <p>23 Q. (BY MR. KO) Which is right</p> <p>24 there in front of you.</p>	<p>1 A. Yes.</p> <p>2 The first class of opinion is</p> <p>3 opinions about the relationship between</p> <p>4 prescription opioid shipments and mortality</p> <p>5 that I may provide opinions on if -- if and</p> <p>6 when NCHS grants me permission to use the</p> <p>7 restricted-use mortality data data.</p> <p>8 The second class of opinions</p> <p>9 are opinions about the impact of defendants'</p> <p>10 challenged conduct on county government</p> <p>11 activity more generally, which I may provide</p> <p>12 opinions on if and when I am able to</p> <p>13 understand the source of plaintiffs'</p> <p>14 allegations about distributor -- the impact</p> <p>15 of distributor defendants' challenged conduct</p> <p>16 on county government activity.</p> <p>17 Q. Okay. And taking that second</p> <p>18 class, as you've described it, first, just so</p> <p>19 I understand and to make sure the record is</p> <p>20 clear, the -- can you describe what you mean</p> <p>21 by "source"?</p> <p>22 MR. GEISE: I'm just going to</p> <p>23 object to the form.</p> <p>24 MR. KO: Sure. Let me ask it</p>

7 (Pages 22 to 25)

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<p style="text-align: right;">Page 26</p> <p>1 more clearly so you understand exactly</p> <p>2 where I'm coming from.</p> <p>3 Q. (BY MR. KO) A moment ago you</p> <p>4 had described two classes of opinions that</p> <p>5 you may give after or that are not contained</p> <p>6 within the four corners of this report;</p> <p>7 correct?</p> <p>8 A. Yes.</p> <p>9 Q. And the second class, you</p> <p>10 claim, was the impact of distributor</p> <p>11 defendants' challenged conduct on county</p> <p>12 government activity; correct?</p> <p>13 A. Yes.</p> <p>14 Q. And I believe you referenced an</p> <p>15 inability to -- an inability to understand</p> <p>16 the source of the data for which you can make</p> <p>17 that calculation.</p> <p>18 Do I understand that correctly?</p> <p>19 A. Yes. And actually let me just</p> <p>20 correct my response to your former question.</p> <p>21 The second class includes not</p> <p>22 only distributor defendants' challenged</p> <p>23 conduct, but also marketing defendants'</p> <p>24 challenged conduct.</p>	<p style="text-align: right;">Page 28</p> <p>1 determine how he had obtained those values,</p> <p>2 and I was unable to find the source of those</p> <p>3 values in the locations that Professor Cutler</p> <p>4 or other witnesses indicated.</p> <p>5 Q. Okay. And is there anything</p> <p>6 else that you can think of that describes</p> <p>7 your inability to find the source of the data</p> <p>8 to come up with an opinion regarding</p> <p>9 defendants' -- or the distributor defendants'</p> <p>10 challenged conduct?</p> <p>11 A. Well, I reviewed Professor</p> <p>12 Cutler's deposition. I reviewed Dr. McCann's</p> <p>13 reports and supplemental material. And</p> <p>14 nowhere could I find the numbers in Professor</p> <p>15 Cutler's report according to the locations</p> <p>16 specified by him in deposition or in any of</p> <p>17 those materials.</p> <p>18 Q. And did you review Dr. McCann's</p> <p>19 deposition transcript?</p> <p>20 A. I don't think I did.</p> <p>21 Q. Okay. Other than the two</p> <p>22 classes of opinions that you have reserved</p> <p>23 the right to offer, are there any other</p> <p>24 opinions that are not contained in this</p>
<p style="text-align: right;">Page 27</p> <p>1 But apologize, let me go back</p> <p>2 to your actual question.</p> <p>3 Yes, I was unable to understand</p> <p>4 the source of the data for what the source of</p> <p>5 the data were for plaintiffs' allegations</p> <p>6 about the impact of distributor defendants'</p> <p>7 challenged conduct on county government</p> <p>8 activity, yes.</p> <p>9 Q. Okay. And can you describe</p> <p>10 what you were unable to understand with</p> <p>11 respect to the source of the data?</p> <p>12 A. Yes. From Professor Cutler's</p> <p>13 report I understood that plaintiffs' had</p> <p>14 calculated the share of shipments that were</p> <p>15 attributable to distributor defendants'</p> <p>16 challenged conduct. That was a table in</p> <p>17 Professor Cutler's report.</p> <p>18 And Professor Cutler had</p> <p>19 explained how he would use that to calculate</p> <p>20 the amount of harm caused by distributor</p> <p>21 defendants' challenged conduct under his</p> <p>22 model.</p> <p>23 So in order to understand what</p> <p>24 Professor Cutler was doing, I sought to</p>	<p style="text-align: right;">Page 29</p> <p>1 report that you may potentially provide at</p> <p>2 trial?</p> <p>3 A. No. I mean, I may use</p> <p>4 demonstratives or other potential materials</p> <p>5 that aren't strictly in the report, but the</p> <p>6 opinions I will offer will all be grounded in</p> <p>7 what's here in front of us.</p> <p>8 Q. Okay. And going back a moment</p> <p>9 ago to again the classes of opinions that you</p> <p>10 may provide later, you also mentioned</p> <p>11 reference to the manufacturer defendants'</p> <p>12 challenged conduct.</p> <p>13 Did I hear you correctly?</p> <p>14 A. I meant to say marketing</p> <p>15 defendants, but yes, that's right.</p> <p>16 Q. Thank you for clarifying.</p> <p>17 So with respect to the</p> <p>18 marketing defendants, what is the potential</p> <p>19 opinion that you plan on giving at trial that</p> <p>20 is not contained in your report?</p> <p>21 MR. GEISE: Object to the form.</p> <p>22 THE WITNESS: Well, it's hard</p> <p>23 for me to say because the plaintiffs'</p> <p>24 estimates of the effect of distributor</p>

8 (Pages 26 to 29)

Highly Confidential - Subject to Further Confidentiality Review

Page 30	Page 32
<p>1 defendants' challenged conduct must</p> <p>2 necessarily depend in part on their</p> <p>3 estimates of the effect of marketing</p> <p>4 defendants' challenged conduct since</p> <p>5 the sum of the effects can't add up to</p> <p>6 more than 100 percent of the harm. So</p> <p>7 given that, I certainly want to</p> <p>8 reserve the right to offer an opinion</p> <p>9 on the effect of distributor</p> <p>10 defendants' challenged conduct. I</p> <p>11 have to also reserve the right to</p> <p>12 offer an opinion on marketing</p> <p>13 defendants' challenged conduct because</p> <p>14 those two effects are interrelated.</p> <p>15 MR. KO: I see.</p> <p>16 Q. (BY MR. KO) Now, going back to</p> <p>17 your report.</p> <p>18 Obviously, you've submitted</p> <p>19 this report in this case. Did you draft the</p> <p>20 entire report on your own?</p> <p>21 A. Well, every word and number in</p> <p>22 here is my own. Others have reviewed this</p> <p>23 report.</p> <p>24 Q. So did you draft the entire</p>	<p>1 him not to answer?</p> <p>2 MR. GEISE: Yes.</p> <p>3 MR. KO: Okay. Did -- and I</p> <p>4 don't need you to understand what</p> <p>5 specifically they did. I am just</p> <p>6 simply asking whether or not they</p> <p>7 engaged in any drafting of the report</p> <p>8 for your review.</p> <p>9 MR. GEISE: It's been asked and</p> <p>10 answered, but you can answer it again.</p> <p>11 THE WITNESS: I wrote the</p> <p>12 report. All the language in it is</p> <p>13 mine.</p> <p>14 Q. (BY MR. KO) And I understand</p> <p>15 that, and I'm simply asking whether or not</p> <p>16 Cornerstone prepared any portions of the</p> <p>17 report for your review.</p> <p>18 A. Well, certainly if by portions</p> <p>19 you would include the tables, yes, they made</p> <p>20 the tables under my supervision and</p> <p>21 direction. I can't make them come out like</p> <p>22 this.</p> <p>23 Q. Sure. In terms of the text and</p> <p>24 any of the words, outside of the tables, did</p>
Page 31	Page 33
<p>1 report on your own?</p> <p>2 A. I would say yes.</p> <p>3 Q. Okay. And I know that, as we</p> <p>4 discussed before, Cornerstone has assisted</p> <p>5 you in preparation of this report.</p> <p>6 Can you describe what they did</p> <p>7 to assist?</p> <p>8 A. Sure. Cornerstone conducted,</p> <p>9 under my supervision and direction, the</p> <p>10 statistical analyses and tabulations</p> <p>11 contained in the report. Cornerstone helped</p> <p>12 me with the literature reviews, although I</p> <p>13 read every one of the papers, at least I</p> <p>14 looked at them and read them myself.</p> <p>15 And Cornerstone helped me with</p> <p>16 formatting and language and stuff like that.</p> <p>17 Q. Did they draft any initial</p> <p>18 portions of the report for your review?</p> <p>19 MR. GEISE: I'm going to object</p> <p>20 to the extent you're asking about</p> <p>21 drafts of a report. I believe that's</p> <p>22 been off-limits for purposes of this</p> <p>23 case and is under the rules.</p> <p>24 MR. KO: Are you instructing</p>	<p>1 Cornerstone play a part in drafting any</p> <p>2 sections for your review?</p> <p>3 A. No. I mean, I wrote the</p> <p>4 report. They commented on it. I would not</p> <p>5 describe what they did as drafting any of it.</p> <p>6 That's just not how I would describe it.</p> <p>7 Q. Sure. Understood. Thank you.</p> <p>8 And so your testimony here</p> <p>9 today is that you drafted all -- the entire</p> <p>10 report on your own; is that correct?</p> <p>11 MR. GEISE: Object to the form,</p> <p>12 misstates the testimony.</p> <p>13 THE WITNESS: I mean, I wrote</p> <p>14 this report. The words are all mine.</p> <p>15 Cornerstone, the folks at</p> <p>16 Cornerstone have reviewed the report,</p> <p>17 they made some comments and</p> <p>18 suggestions, some of which I accepted,</p> <p>19 some of which I rejected.</p> <p>20 All words here, all the wording</p> <p>21 is mine. All the concepts are mine.</p> <p>22 Q. (BY MR. KO) So you have just</p> <p>23 indicated that Cornerstone made some comments</p> <p>24 and some suggestions.</p>

9 (Pages 30 to 33)

Highly Confidential - Subject to Further Confidentiality Review

<p style="text-align: right;">Page 34</p> <p>1 Can you describe what comments 2 and suggestions they made to your report? 3 MR. GEISE: Object and instruct 4 you not to answer to the extent this 5 gets into the drafting process and the 6 prior drafts of the report. 7 Q. (BY MR. KO) Are you going to 8 follow your counsel's instruction there? 9 A. Yes. 10 Q. Okay. Are there any aspects of 11 what they said or commented on the report 12 that were not related to the actual drafting 13 of the report? 14 A. No. 15 Q. Okay. Approximately how much 16 time did you spend drafting the report on 17 your own? 18 A. Do you mean from the start, 19 when I started reviewing documents in this 20 matter all the way up until I turned in the 21 report? Is that the amount that you're 22 asking for? 23 Q. Well, actually, let's start 24 with -- and I appreciate the clarifying</p>	<p style="text-align: right;">Page 36</p> <p>1 for deposition. So up -- sorry, up until the 2 submission of the report, and then I would 3 say that's probably 350 hours. In that 4 ballpark. 5 Q. And is there any way that you 6 can break down -- well, a moment ago you had 7 said that you had reviewed certain documents 8 that weren't relevant to your report or were 9 not relevant in connection with this 10 deposition, at least from your perspective. 11 Was any of that 350 hours spent 12 reviewing documents that are not relevant to 13 your report? 14 A. Yes. 15 Q. Do you have an approximate 16 breakdown on the percentage? 17 A. Oh, gosh. I mean, I guess when 18 you say not relevant to, I was thinking 19 documents that I read that I didn't rely on 20 in forming my opinions. And so there were so 21 many documents. Gosh, I just don't know. 22 Q. Sure. 23 A. Yeah. 24 Q. So of -- with respect to the</p>
<p style="text-align: right;">Page 35</p> <p>1 question back to me. 2 Let's start with the simple 3 drafting of the actual report, which I 4 understand you did on your own, separate and 5 apart from any introductory or background 6 materials that were reviewed. 7 With respect to drafting the 8 report, approximately how much time did you 9 spend doing so? 10 A. It's hard for me to estimate, 11 because a lot of the time drafting is spent 12 back and forth looking at and reviewing all 13 the materials. So I'm not sure -- I guess 14 I'm just not understanding what the line is 15 between reviewing materials and drafting. 16 Q. Okay. So then let's start -- 17 or let's go back and expand it to time spent 18 reviewing materials. Approximately how much 19 time would you say you have spent drafting 20 the report when also considering that that 21 would include reviewing materials? 22 A. Sure. So that -- what I 23 understand you to be asking is the time I've 24 spent on this matter up until the preparation</p>	<p style="text-align: right;">Page 37</p> <p>1 350 hours that you've spent, it's my 2 understanding that that's the approximate 3 total amount you've spent in connection with 4 this litigation and your retention in this 5 case. 6 Is that accurate to say? 7 MR. GEISE: Object to the form. 8 THE WITNESS: No. I was 9 responding that that's the amount I 10 spent from my retention to the 11 submission of the report, to the final 12 production and submission of the 13 report. 14 MR. KO: And thank you. And 15 sorry for interrupting. 16 THE WITNESS: No, no. 17 Q. (BY MR. KO) So with that 18 clarification, let me ask: Approximately how 19 much time have you spent in this matter as a 20 whole? 21 A. Between 350 and 400 hours. 22 Q. And when were you first 23 retained in this matter? 24 A. June of 2018.</p>

10 (Pages 34 to 37)

Highly Confidential - Subject to Further Confidentiality Review

<p style="text-align: right;">Page 38</p> <p>1 Q. And I understand you were 2 retained by Walmart; correct? 3 A. Yes. 4 Q. And do you also -- was your 5 engagement agreement or your retention 6 agreement with Walmart and Jones Day or -- 7 I'll stop there. 8 Just so the record is clear, 9 was your engagement agreement or your 10 retention agreement with Walmart and 11 Jones Day? 12 A. Yes. 13 Q. I want to ask you some more 14 questions about your engagement in a moment, 15 but first can you turn with me to page 62 of 16 your expert report? 17 A. Sure. 18 Q. And so the record is clear, 19 page 62 is the beginning of Professor 20 Kessler's report -- or excuse me, is the 21 beginning of the appendices of Professor 22 Kessler's expert report. And on page 62 is 23 the beginning of appendix A, which is set 24 forth as CV and testimony list.</p>	<p style="text-align: right;">Page 40</p> <p>1 Q. How were you able to obtain 2 both of those degrees concurrently? 3 A. I was a resident in 4 Massachusetts from 1988 to 1990. Then a 5 resident in California from 1992, '93, making 6 some visits back to Massachusetts in 1992, 7 '93, to defend my thesis and complete my 8 degree. 9 Q. So I might be just as confused 10 as Debbie, but is there a -- there's a 11 two-year gap where maybe you weren't a 12 resident somewhere, or did I miss that? I 13 believe you said that you were a resident in 14 Massachusetts from 1988 to 1990? Or did you 15 say 1998 to 1992? 16 A. I was a resident in 17 Massachusetts from 1988 to 1990. 18 Then probably officially a 19 California resident from 1990 to today. 20 In 1992-93, I made some trips 21 back to Massachusetts to defend my thesis and 22 complete my degree. 23 Q. Okay. Thank you for that 24 clarification.</p>
<p style="text-align: right;">Page 39</p> <p>1 Do you see that? 2 A. Excuse me. Yes. 3 Q. And the CV that appears 4 following page 62 is accurate as of today; 5 correct? 6 A. Yes. 7 Q. Do you have any updates or 8 revisions you'd like to provide to this CV? 9 A. No. 10 Q. Now, you've indicated that you 11 have a Ph.D. in economics from MIT from 1994. 12 And I see that you also have a JD from 13 Stanford in 1993. Did you do those programs 14 concurrently? 15 A. Yes. 16 Q. And when did you start at MIT? 17 For purposes of your Ph.D., when did you 18 start at MIT? 19 A. In 1988. 20 Q. And when did you start at 21 Stanford Law School? 22 A. 1990. 23 Q. Did you commute? 24 A. No.</p>	<p style="text-align: right;">Page 41</p> <p>1 And what did you write your 2 thesis in for purposes of your Ph.D. at MIT? 3 A. My thesis was on the topics of 4 health economics and law and economics using 5 empirical statistical methods. 6 Q. And did you have a particular 7 focus with respect to those two general and 8 broad categories? 9 A. That's how I would describe it. 10 Q. Okay. And while you were at 11 MIT, were you part of any organizations or 12 groups? 13 A. Gosh, I don't -- I mean, I just 14 don't remember. I'm not sure what you're 15 asking. 16 Q. Well, oftentimes at schools and 17 grad schools there are organizations, clubs, 18 things of that nature. Were you affiliated 19 with any such clubs or organizations when you 20 were at MIT? 21 A. I don't remember. 22 Q. Sure. Did you receive any 23 awards or honors at MIT while obtaining your 24 Ph.D.?</p>

11 (Pages 38 to 41)

Highly Confidential - Subject to Further Confidentiality Review

Page 42	Page 44
<p>1 A. I was a National Science 2 Foundation fellow at MIT. I was a -- I 3 had -- I had some other MIT-based fellowship. 4 Gosh, I just don't -- it was so long ago. I 5 just don't remember really. 6 Q. Fair enough. 7 You know Professor Gruber; 8 correct? 9 A. I know Professor Gruber 10 professionally, yes. 11 Q. And when did you first meet 12 Professor Gruber? 13 A. Oh, gosh. Long ago. 14 Q. Did you guys overlap at MIT? 15 A. You know, I can't remember if 16 Professor Gruber went to Harvard or MIT for 17 grad school now. 18 I do remember I've -- I've 19 known Professor Gruber for years. 20 Q. Approximately how many years? 21 A. 25 years. 22 Q. Okay. But you didn't attend 23 school with him ever? At least as far as you 24 recall?</p>	<p>1 in demographic trends in the United States 2 and particularly -- in particular about 3 trends among aging and older Americans. And 4 they have affiliates throughout the 5 university who also are interested in the 6 study of aging, which I am, insofar as aging 7 Americans use a lot of healthcare and use a 8 lot of publicly funded healthcare through the 9 Medicare program. 10 I also have some familiarity 11 with the basic demographics of aging, and so 12 I enjoy participating in events that they 13 have studying that because I can learn from 14 the demographers and others who work on that 15 at the center. 16 Q. And can you describe the extent 17 of your affiliation. 18 In other words, what is -- 19 affiliate, to a layperson, means that you're 20 associated. Some people could defer with 21 that interpretation, but generally speaking 22 an affiliate means that you're associated 23 with an organization. Can you describe to 24 the Court and to the jury the extent of your</p>
Page 43	Page 45
<p>1 A. I think he was a year or two 2 ahead of me, but I'm not sure -- I just don't 3 remember. 4 I do remember him as part of 5 the community, but I don't remember 6 overlapping specifically. 7 Q. I'm going back to your CV 8 that's listed after page 62 in your report. 9 You also list certain awards 10 and fellowships. Do you see that at the 11 bottom of your CV? 12 A. Yes. 13 Q. And I just want to get an 14 understanding on a few of these. With 15 respect to the Stanford Center on Longevity, 16 you indicate you have been an affiliate since 17 2008; correct? 18 A. Yes. 19 Q. Can you describe the extent of 20 your involvement with the Stanford Center on 21 Longevity? 22 A. Sure. Absolutely. 23 The Stanford Center on 24 Longevity is a center that's very interested</p>	<p>1 involvement with the Stanford Center on 2 Longevity? 3 A. Sure. I attend events that 4 they have. I speak with the management and 5 the fellows who are resident there. And I 6 review and read some of their materials when 7 they come out. 8 Q. Okay. And you've listed your 9 affiliation with this group under the awards 10 and fellowships, and so I want to understand 11 why you've done that. 12 A. Sure. I mean, I consider it an 13 honor that they wanted me to be an affiliate 14 with them. I think it's a fantastic group 15 that does important work. And so I'm -- I'm 16 honored that they invited me to participate 17 in their organization. 18 Q. And how many affiliates are 19 there with this particular organization? Do 20 you know? 21 A. Gosh, I don't know. 22 Q. Okay. 23 Any ballpark estimation at all? 24 A. No, I don't know.</p>

12 (Pages 42 to 45)

Highly Confidential - Subject to Further Confidentiality Review

Page 46	Page 48
<p>1 Q. Is it over 50?</p> <p>2 A. I just really don't know.</p> <p>3 Q. Okay. You've also listed that</p> <p>4 you are an affiliate for both the Center for</p> <p>5 Social Innovation at the Stanford business</p> <p>6 school as well as an affiliate for the Center</p> <p>7 for Health Policy at Stanford.</p> <p>8 Do you see those listed under</p> <p>9 your awards and fellowships?</p> <p>10 A. Yes.</p> <p>11 Q. So is your response with</p> <p>12 respect to those two organizations the same</p> <p>13 that you provided regarding the Stanford</p> <p>14 Center on Longevity? In other words, you've</p> <p>15 listed those under your awards and</p> <p>16 fellowships because you're considering it an</p> <p>17 honor to be a part of those groups?</p> <p>18 A. Yes. I do.</p> <p>19 I've actually been more</p> <p>20 involved with the Center for Social</p> <p>21 Innovation and with the Center for Health</p> <p>22 Policy than with the Center on Longevity, but</p> <p>23 I also consider it an honor that those groups</p> <p>24 have invited me to participate, yes.</p>	<p>1 They still consult me on</p> <p>2 various internal governance matters because</p> <p>3 of my historical links with the center.</p> <p>4 Q. Okay. And do you know</p> <p>5 approximately how many affiliates there are</p> <p>6 at the Center For Social Innovation?</p> <p>7 A. No, I don't know.</p> <p>8 Q. The same question with respect</p> <p>9 to the Center For Health Policy. Do you know</p> <p>10 how many affiliates there are?</p> <p>11 A. No, I don't know.</p> <p>12 Q. Now, I also understand that you</p> <p>13 are a research associate for the National</p> <p>14 Bureau of Economic Research and you've been</p> <p>15 such -- or you've been a research associate</p> <p>16 since 1999; is that correct?</p> <p>17 A. Yes, I'm a research associate</p> <p>18 at the National Bureau, yes.</p> <p>19 Q. And can you describe to the</p> <p>20 Court and the jury the extent of your</p> <p>21 involvement with the NBER?</p> <p>22 A. Sure. The NBER is a</p> <p>23 non-profit, non-partisan economic research</p> <p>24 organization. I participate in their</p>
Page 47	Page 49
<p>1 Q. Okay. And so let's take the</p> <p>2 Center For Health Policy first. You've said</p> <p>3 that you are involved more than your</p> <p>4 affiliation with the Stanford Center on</p> <p>5 Longevity.</p> <p>6 Can you describe to the Court</p> <p>7 the extent of your involvement with that</p> <p>8 particular organization?</p> <p>9 A. Sure. I'm also a professor by</p> <p>10 courtesy at the Stanford school of medicine,</p> <p>11 which is where the Center For Health Policy</p> <p>12 is focused.</p> <p>13 And so I'm -- you know, I'm a</p> <p>14 professor by courtesy in that department. So</p> <p>15 that's an additional link that I have with</p> <p>16 the Center For Health Policy.</p> <p>17 The Center For Social</p> <p>18 Innovation, I taught for many years at the</p> <p>19 graduate school of business. I still teach a</p> <p>20 class over there, but I had been teaching</p> <p>21 courses that were part of the center's</p> <p>22 purview for many, many years. And so that's,</p> <p>23 you know, an additional link that I have with</p> <p>24 the Center For Social Innovation.</p>	<p>1 activities. I use their computer systems.</p> <p>2 I've administered grants through them over</p> <p>3 the years. And I consider it an honor to be</p> <p>4 a research associate there. That's why I've</p> <p>5 put it on my CV.</p> <p>6 Q. You are aware of -- or you know</p> <p>7 who Professor David Cutler is; correct?</p> <p>8 A. Yes, I know who Professor</p> <p>9 Cutler is.</p> <p>10 Q. And do you know whether or not</p> <p>11 he's a research associate at the NBER?</p> <p>12 A. Yeah, I'm sure David -- I'm</p> <p>13 sure Professor Cutler is a research associate</p> <p>14 at the NBER.</p> <p>15 Q. And a moment ago we talked</p> <p>16 about Professor John Gruber. Do you know</p> <p>17 whether or not he is a research associate at</p> <p>18 the NBER?</p> <p>19 A. Yes.</p> <p>20 Q. Okay. Yes, he -- you are aware</p> <p>21 that he is a research associate; correct?</p> <p>22 A. Your question was did I know</p> <p>23 whether he was a research associate. I do</p> <p>24 know, and yes, I know that he is a research</p>

13 (Pages 46 to 49)

Highly Confidential - Subject to Further Confidentiality Review

Page 50	Page 52
<p>1 associate.</p> <p>2 Q. Okay. Thank you for that</p> <p>3 clarification.</p> <p>4 Do you also know who Professor</p> <p>5 Tom McGuire is?</p> <p>6 A. I know who Professor Tom</p> <p>7 McGuire is, yes.</p> <p>8 Q. And how long have you known</p> <p>9 Professor McGuire?</p> <p>10 A. I don't know Professor McGuire</p> <p>11 as well as I know Professor Gruber.</p> <p>12 I know him professionally. I'm</p> <p>13 not sure how long.</p> <p>14 Q. Okay. Fair enough.</p> <p>15 Do you know whether or not he's</p> <p>16 a research associate at the National Bureau</p> <p>17 of Economic Research?</p> <p>18 A. I don't know.</p> <p>19 Q. Okay. Do you know Professor</p> <p>20 Jeffrey Liebman?</p> <p>21 A. I do know Professor Liebman.</p> <p>22 Q. And how long have you known</p> <p>23 him?</p> <p>24 A. Wow. I -- again, I only know</p>	<p>1 all very smart academic researchers.</p> <p>2 I certainly have read many of</p> <p>3 the papers that they've written, and</p> <p>4 learned from them.</p> <p>5 Q. (BY MR. KO) And do you know</p> <p>6 Professor Meredith Rosenthal?</p> <p>7 A. Not really.</p> <p>8 Q. Okay. You don't have a</p> <p>9 professional relationship with her?</p> <p>10 A. No, I would not say I know</p> <p>11 Professor Rosenthal professionally, no.</p> <p>12 Q. So is it fair to say that you</p> <p>13 know Professors Cutler, Gruber, McGuire, and</p> <p>14 Liebman more than you know Professor</p> <p>15 Rosenthal?</p> <p>16 A. Yes. That's a correct</p> <p>17 assessment.</p> <p>18 Q. Okay. Now going back to your</p> <p>19 CV on the awards and fellowships that you</p> <p>20 list, are there -- I just want to make sure</p> <p>21 the record is clear, are there any other</p> <p>22 awards or fellowships that you can think of</p> <p>23 that you have had or currently have that are</p> <p>24 not listed here?</p>
Page 51	Page 53
<p>1 him professionally. Probably 20 years. In</p> <p>2 the ballpark of 20 years.</p> <p>3 Q. And are you aware of whether or</p> <p>4 not he is a research associate at the NBER?</p> <p>5 A. I believe he is, but I am not</p> <p>6 certain. Yeah, I'm not certain.</p> <p>7 Q. Okay. By the way, with respect</p> <p>8 to all four of these professors that we just</p> <p>9 discussed, Professors Gruber, Cutler,</p> <p>10 McGuire, and Liebman, do you know any of them</p> <p>11 outside of your professional capacity?</p> <p>12 A. No.</p> <p>13 Q. In other words, would you</p> <p>14 consider any of them your colleagues?</p> <p>15 MR. GEISE: Object to the form.</p> <p>16 THE WITNESS: Yes. I mean, I'd</p> <p>17 consider them all my colleagues.</p> <p>18 MR. KO: Okay. Great.</p> <p>19 THE WITNESS: In a professional</p> <p>20 context.</p> <p>21 Q. (BY MR. KO) Do you respect all</p> <p>22 four of them?</p> <p>23 MR. GEISE: Objection, vague.</p> <p>24 THE WITNESS: I think they're</p>	<p>1 A. Gosh, I -- I don't know. I</p> <p>2 mean, I've -- over time, had many fellowships</p> <p>3 and awards. These are the most important</p> <p>4 ones.</p> <p>5 Q. Okay. Fair enough.</p> <p>6 A. And most recent.</p> <p>7 Q. They're the most recent ones?</p> <p>8 A. Yes. Well, it's not -- that's</p> <p>9 really not accurate. These are the most</p> <p>10 important ones. That's a more accurate</p> <p>11 response to your question.</p> <p>12 Q. Okay. Thank you for that</p> <p>13 clarification.</p> <p>14 Regarding the academic</p> <p>15 publications that you've listed on your CV</p> <p>16 that appear on pages 2 through 7, are these</p> <p>17 all the academic publications that you have</p> <p>18 either authored or coauthored in your</p> <p>19 professional career?</p> <p>20 A. Yes.</p> <p>21 Q. Are there any academic</p> <p>22 publications that are not listed here that</p> <p>23 you have authored or coauthored?</p> <p>24 A. No.</p>

14 (Pages 50 to 53)

Highly Confidential - Subject to Further Confidentiality Review

Page 54	Page 56
<p>1 Q. And you've also, at the bottom</p> <p>2 of page 7, listed three academic manuscripts</p> <p>3 in progress. Do you see that?</p> <p>4 A. Yes.</p> <p>5 Q. Can you describe what you mean</p> <p>6 when you reference -- or when you indicate</p> <p>7 that these are academic manuscripts in</p> <p>8 progress?</p> <p>9 A. Sure. A manuscript in</p> <p>10 progress, as I listed on my CV, is one that</p> <p>11 is in manuscript form and ready to be shared</p> <p>12 and commented on but not yet accepted for</p> <p>13 publication.</p> <p>14 Q. So the intention is for these</p> <p>15 three manuscripts in progress to be academic</p> <p>16 publications. Is that fair to say?</p> <p>17 A. Yes.</p> <p>18 Q. And your CV going forward to</p> <p>19 page 8 also sets forth certain non-academic</p> <p>20 publications; correct?</p> <p>21 A. Yes.</p> <p>22 Q. Are there any other</p> <p>23 non-academic publications that appear -- or</p> <p>24 that do not appear here that you have</p>	<p>1 Kessler, welcome back from the break.</p> <p>2 Before we had to go off the</p> <p>3 record for a bit, we were discussing the case</p> <p>4 studies that appeared on your CV on page 9.</p> <p>5 Do you see that?</p> <p>6 A. Yes.</p> <p>7 Q. And actually I want to turn to</p> <p>8 the next page, page 10, where you list five</p> <p>9 unpublished reports. Are those all the</p> <p>10 unpublished reports that you have either</p> <p>11 authored or coauthored in your professional</p> <p>12 career?</p> <p>13 A. Yes.</p> <p>14 Q. And why are those reports</p> <p>15 unpublished?</p> <p>16 A. I didn't make sufficient effort</p> <p>17 to get them published, to develop them into</p> <p>18 publishable form, but they're publicly</p> <p>19 available reports that I prepared either for</p> <p>20 a foundation or for a client. And so I list</p> <p>21 them in the interest of full disclosure and</p> <p>22 completeness.</p> <p>23 Q. Are there any of these five</p> <p>24 reports which you submitted for publication</p>
Page 55	Page 57
<p>1 authored or coauthored in your professional</p> <p>2 career?</p> <p>3 A. Not that I'm aware of.</p> <p>4 Q. And you've also listed, at the</p> <p>5 bottom of page 9, four case studies that you</p> <p>6 have been a part of. Do you see that?</p> <p>7 A. Yes.</p> <p>8 Q. Are there any other case</p> <p>9 studies that are not listed here that you</p> <p>10 have either authored, coauthored, or been a</p> <p>11 part of?</p> <p>12 A. No.</p> <p>13 Q. Thank you.</p> <p>14 Sure.</p> <p>15 MR. KO: Debbie has indicated</p> <p>16 that she needs a moment to go off the</p> <p>17 record.</p> <p>18 THE VIDEOGRAPHER: Time is now</p> <p>19 9:58. Going off the record.</p> <p>20 (Recess taken, 9:58 a.m. to</p> <p>21 10:16 a.m.)</p> <p>22 THE VIDEOGRAPHER: The time is</p> <p>23 now 10:15. Back on the record.</p> <p>24 Q. (BY MR. KO) Okay. Professor</p>	<p>1 that were rejected?</p> <p>2 A. No.</p> <p>3 Q. Okay. So going back to all of</p> <p>4 the studies that you list here, does your CV</p> <p>5 accurately reflect all the academic</p> <p>6 publications, all the academic manuscripts in</p> <p>7 progress, all the non-academic publications,</p> <p>8 all the case studies, and all the unpublished</p> <p>9 reports you have either authored or</p> <p>10 coauthored in your professional career?</p> <p>11 A. Yes.</p> <p>12 Q. Great. And on the final</p> <p>13 section of your CV, you indicate that you</p> <p>14 have been a referee or reviewer for certain</p> <p>15 journals; is that correct?</p> <p>16 A. Yes.</p> <p>17 Q. Approximately how long have you</p> <p>18 been a referee or reviewer for any of these</p> <p>19 journals?</p> <p>20 A. Oh, my gosh. Many of these go</p> <p>21 back 20 years. But they're ongoing.</p> <p>22 Can you be more specific?</p> <p>23 Q. Sure. When did you first</p> <p>24 become a referee or reviewer for any of the</p>

15 (Pages 54 to 57)

Highly Confidential - Subject to Further Confidentiality Review

<p style="text-align: right;">Page 58</p> <p>1 journals listed in your CV?</p> <p>2 A. When did I first become a</p> <p>3 referee or reviewer for any journal?</p> <p>4 1993-'94.</p> <p>5 Q. And are there any of these</p> <p>6 journals or publications for which you are</p> <p>7 now no longer a referee or reviewer?</p> <p>8 A. There are none that have</p> <p>9 informed me that I'm never going to referee</p> <p>10 for them or review for them. There are some</p> <p>11 organizations and journals for which I have</p> <p>12 not refereed or reviewed a paper in a while,</p> <p>13 but they will often come back to me and ask</p> <p>14 me to do something for them after a year or</p> <p>15 two of not contacting me.</p> <p>16 Q. Sure. And so is that your</p> <p>17 definition of "a while," maybe a year or two,</p> <p>18 in the context of these questions that we're</p> <p>19 discussing in terms of your involvement as a</p> <p>20 referee or reviewer?</p> <p>21 A. Yes.</p> <p>22 Q. Out of these journals and</p> <p>23 organizations, are there any that -- or which</p> <p>24 one of these journals or publications have</p>	<p style="text-align: right;">Page 60</p> <p>1 largest number of papers is the -- it's</p> <p>2 either the Journal of Health Economics or</p> <p>3 Health Affairs, where I review lots and lots</p> <p>4 of manuscripts.</p> <p>5 Q. Okay. And can you give me an</p> <p>6 approximate breakdown of what you mean by</p> <p>7 "lots"?</p> <p>8 A. Oh, gosh. It seems like a lot.</p> <p>9 Well, for the Journal of Health</p> <p>10 Economics, I just finished two manuscript</p> <p>11 reviews last week. Preceding that, I had one</p> <p>12 or two a few months ago.</p> <p>13 Health Affairs, I'll get review</p> <p>14 requests maybe once every two to three</p> <p>15 months.</p> <p>16 Q. Okay. And how long has that</p> <p>17 been the case with respect to -- starting</p> <p>18 with the Health Affairs?</p> <p>19 A. Well, I mean, I don't</p> <p>20 remember -- I mean, a long time. Ten years</p> <p>21 maybe. I don't know.</p> <p>22 Q. Okay. So is it fair to say</p> <p>23 that over the course of the past ten years</p> <p>24 you received approximately four manuscripts</p>
<p style="text-align: right;">Page 59</p> <p>1 you had the greatest involvement in in terms</p> <p>2 of being a referee or reviewer?</p> <p>3 MR. GEISE: Object to the form.</p> <p>4 THE WITNESS: Well, it would</p> <p>5 depend -- it depends sort of what you</p> <p>6 mean by that. I guess I'm not sure I</p> <p>7 understand the question.</p> <p>8 Q. (BY MR. KO) Well, we can</p> <p>9 turn -- we can talk in terms of quantity to</p> <p>10 begin with.</p> <p>11 In terms of the amount of times</p> <p>12 that you have been asked to be a referee or a</p> <p>13 reviewer for a particular publication or</p> <p>14 article, which particular publications or</p> <p>15 journals would you describe as having the</p> <p>16 greatest involvement in?</p> <p>17 A. Well, so this -- this list</p> <p>18 includes both publications and foundations</p> <p>19 and grantors. And so for the foundations and</p> <p>20 grantors, I serve as a reviewer of grants,</p> <p>21 not as a referee of academic papers. But</p> <p>22 limiting your question to the journals, which</p> <p>23 is what I understood it to be, probably the</p> <p>24 journal that, for which I've refereed the</p>	<p style="text-align: right;">Page 61</p> <p>1 to referee from the Journal of Health</p> <p>2 Affairs?</p> <p>3 MR. GEISE: Object to the form.</p> <p>4 THE WITNESS: More than four</p> <p>5 over the last decade.</p> <p>6 Q. (BY MR. KO) I meant -- sorry,</p> <p>7 I meant four per year on an annual basis.</p> <p>8 A. Probably less than four per</p> <p>9 year. Probably not 40 over the past decade.</p> <p>10 I would have to speculate. I just don't keep</p> <p>11 track.</p> <p>12 Q. Sure. And with respect to the</p> <p>13 Journal of Health Economics, would you say</p> <p>14 that you referee more or less than the amount</p> <p>15 of times you referee for Health Affairs?</p> <p>16 A. It's hard to say. I really</p> <p>17 don't know. I don't keep track.</p> <p>18 Q. Sure. And you don't get</p> <p>19 compensated in your role as a referee, do</p> <p>20 you?</p> <p>21 A. No. Actually, you should add</p> <p>22 some of these do pay referees. But not the</p> <p>23 Journal of Health Affairs or Health</p> <p>24 Economics. But some do.</p>

16 (Pages 58 to 61)

Highly Confidential - Subject to Further Confidentiality Review

Page 62	Page 64
<p>1 Q. Going back to the Academic 2 Publications that you list on page 2 of your 3 CV, you list several -- I'll give you a 4 moment to get there. 5 Let me know when you get back 6 to that page? 7 A. Yes. 8 Q. So on this first page, you list 9 several academic publications, many of which 10 you've coauthored with Laurence Baker and 11 Kate Bundorf; correct? 12 A. Yes. 13 Q. Is it fair to say that the 14 majority of the academic publications you've 15 had in the last four to five years have, in 16 fact, been with these two individuals? 17 A. I think that's accurate. 18 Q. And who is Laurence Baker? 19 A. Laurence Baker is a professor 20 at Stanford Medical School. 21 Q. And who is Kate Bundorf? 22 A. Kate Bundorf is also a 23 professor at Stanford Medical School. 24 Q. And are you colleagues with</p>	<p>1 litigation prior to when he disclosed his 2 report on May 10th? 3 A. No. 4 Q. And did you ever communicate 5 with him about this litigation at all? 6 A. No. 7 Q. Okay. What about -- same 8 question with respect to Kate Bundorf. Have 9 you spoken with her at all about your work in 10 this litigation? 11 A. No. 12 Q. Relatedly, have you spoken with 13 anyone outside of counsel that you prepared 14 with and helped you -- strike that. 15 Other than counsel at Jones Day 16 and individuals at Cornerstone, have you 17 spoken with anyone else in connection with 18 this litigation? 19 A. Does that include my wife? 20 Q. Sure. 21 A. Yes, I've told my wife about my 22 participation in this matter. 23 Q. Other than your wife or 24 individuals at -- attorneys at Jones Day or</p>
Page 63	Page 65
<p>1 both of them? 2 A. Yes. 3 Q. Are you friends with both of 4 them? 5 A. We're professional colleagues. 6 Q. Would you say you have a 7 relationship with them outside of your 8 professional capacity? 9 A. We're friendly with our 10 families in a broad sense, but we are not 11 close friends. 12 I am not close friends with 13 either Professor Baker or Professor Bundorf. 14 Q. Fair enough. 15 Do you know that Professor 16 Laurence Baker has been disclosed as an 17 expert in this litigation as well for the 18 defendants? 19 A. Yes. 20 Q. Okay. 21 And when did you learn of that? 22 A. After he submitted his report. 23 Q. Okay. So did you have any 24 communications with him with respect to this</p>	<p>1 individuals at Cornerstone, have you spoken 2 with anyone else about this litigation? 3 A. I have also informed my 4 children. 5 Q. Other than your family, counsel 6 at Jones Day, and individuals at Cornerstone, 7 have you spoken with anyone else about this 8 litigation? 9 A. No. 10 Q. You've not spoken with any of 11 your colleagues or other professors at 12 Stanford or any of the organizations that 13 you're affiliated with about your work in 14 this case? 15 A. No. 16 Q. Okay. With respect to Laurence 17 Baker, do you work with him in any other 18 capacity outside of co-authoring academic 19 publications with him? 20 A. Well, I'm a member of -- a 21 professor, by courtesy, in his department. 22 So we do meet periodically with 23 regard to health research and policy 24 departmental issues.</p>

17 (Pages 62 to 65)

Highly Confidential - Subject to Further Confidentiality Review

Page 66	Page 68
<p>1 Q. Outside of the relationship you</p> <p>2 have with him as -- at the medical school, do</p> <p>3 you work -- and outside of the academic</p> <p>4 publications that you have coauthored with</p> <p>5 him, do you have any other relationship with</p> <p>6 Professor Baker or do you work with him in</p> <p>7 any other capacity?</p> <p>8 A. Oh, yes. We are also on the</p> <p>9 Stanford University Benefits Committee</p> <p>10 together. The committee on faculty/staff</p> <p>11 human resources. So I work with Lauren in</p> <p>12 that capacity as well, with Professor Baker.</p> <p>13 Q. How many individuals -- well,</p> <p>14 let me rephrase.</p> <p>15 In terms of this role that you</p> <p>16 just described, so you and Professor Baker,</p> <p>17 among others, work to develop the programs or</p> <p>18 the plans that Stanford professors and</p> <p>19 employees can obtain in terms of health</p> <p>20 benefits?</p> <p>21 A. I'm sorry, are you talking</p> <p>22 about the responsibilities of the committee</p> <p>23 on faculty/staff human resources?</p> <p>24 Q. Yeah, let's start there. Can</p>	<p>1 Q. And how long have you been an</p> <p>2 advisory committee member?</p> <p>3 A. I'm a full committee member.</p> <p>4 The committee's role is advisory.</p> <p>5 We don't have authority to make</p> <p>6 benefits decisions for the university.</p> <p>7 That's what I meant by advisory. I served on</p> <p>8 the committee -- I believe we have five-year</p> <p>9 terms or three-year terms.</p> <p>10 I served one term in the 2000s,</p> <p>11 and then the director of benefits asked me to</p> <p>12 return to the committee, maybe it was last</p> <p>13 year.</p> <p>14 And I agreed to.</p> <p>15 Q. Okay. As a committee member,</p> <p>16 did you ever have any communications or</p> <p>17 engage in any of the negotiations on behalf</p> <p>18 of the university with insurers or plan</p> <p>19 providers?</p> <p>20 A. We certainly communicate with</p> <p>21 the director of human resources and the</p> <p>22 director of benefits regarding their</p> <p>23 negotiations with our insurers.</p> <p>24 I do not and we as a committee</p>
Page 67	Page 69
<p>1 you describe the responsibilities you have in</p> <p>2 that regard?</p> <p>3 A. Of course.</p> <p>4 The committee on faculty and</p> <p>5 staff human resources is an advisory</p> <p>6 committee to the director of human resources</p> <p>7 of the university.</p> <p>8 On the committee are some</p> <p>9 faculty members who have research interests</p> <p>10 that overlap with the committee's area of</p> <p>11 study. Some staff members, the CFO of the</p> <p>12 university is on the committee, Randy</p> <p>13 Livingston, and the director of human</p> <p>14 resources and the director of benefits are</p> <p>15 also on the committee.</p> <p>16 Our role is advisory to the</p> <p>17 director of human resources and the CFO. We</p> <p>18 do not have any authority to make decisions</p> <p>19 at the university.</p> <p>20 Q. How many members are on the</p> <p>21 advisory committee?</p> <p>22 A. The committee itself consists</p> <p>23 of maybe 15 members total. Something in --</p> <p>24 15 to 20. We meet monthly.</p>	<p>1 do not negotiate with anyone directly.</p> <p>2 Q. So just so the record is clear</p> <p>3 and to make sure I understand, have you had</p> <p>4 any direct communications or negotiations</p> <p>5 with any insurers in your capacity as a</p> <p>6 committee member?</p> <p>7 A. I have had direct</p> <p>8 communications with insurers in my capacity</p> <p>9 as a committee member, request -- helping the</p> <p>10 committee to request information from the</p> <p>11 insurers regarding what they've -- their bids</p> <p>12 and what they've offered to do for the</p> <p>13 university. But I have no role in</p> <p>14 negotiating anything.</p> <p>15 Q. And do you know how long</p> <p>16 Professor Baker has been on this committee?</p> <p>17 A. I don't.</p> <p>18 Q. Now going back to your CV and</p> <p>19 turning specifically to page 8, where you</p> <p>20 list non-academic publications, is it fair to</p> <p>21 say you've also coauthored several of these</p> <p>22 non-academic publications with Glenn Hubbard?</p> <p>23 A. Yes.</p> <p>24 Q. And actually in addition to the</p>

18 (Pages 66 to 69)

Highly Confidential - Subject to Further Confidentiality Review

Page 70	Page 72
<p>1 non-academic publications, I've also noticed</p> <p>2 that you've coauthored several academic</p> <p>3 publications with him as well.</p> <p>4 Is that fair to say?</p> <p>5 A. Yes.</p> <p>6 Q. Okay. And same types of</p> <p>7 questions with respect to Glenn Hubbard as</p> <p>8 I've been asking about Lawrence Baker and</p> <p>9 Kate Bundorf.</p> <p>10 Do you know him -- or are you</p> <p>11 professional colleagues with Glenn Hubbard?</p> <p>12 A. Yes. I know Professor Hubbard</p> <p>13 in a professional context. We are not</p> <p>14 personal friends.</p> <p>15 Q. And how long have you known</p> <p>16 Glenn Hubbard?</p> <p>17 A. Oh, gosh. I've known Professor</p> <p>18 Hubbard for -- I don't know. Maybe 15 years?</p> <p>19 I -- I would have to look back.</p> <p>20 Q. And do you work with him in any</p> <p>21 professional capacity outside of co-authoring</p> <p>22 non-academic publications and academic</p> <p>23 publications with him?</p> <p>24 A. Professor Hubbard helped me</p>	<p>1 A. H-U-S-S-A-I-N.</p> <p>2 Q. And what did he specifically</p> <p>3 approach you about?</p> <p>4 A. Mr. Hussain said that there was</p> <p>5 a matter -- I forget if he even mentioned it</p> <p>6 was -- the specific subject of it, but then</p> <p>7 he put me in touch with -- I believe with</p> <p>8 Mr. Geise.</p> <p>9 Q. Okay. And that was</p> <p>10 approximately June of 2018? Or before?</p> <p>11 A. Okay. I think it was -- yeah,</p> <p>12 the beginning of June of 2018. I think</p> <p>13 that's right.</p> <p>14 Q. Okay. So did Mr. Hussain</p> <p>15 approach you -- what were you first</p> <p>16 contacted -- or what were you first asked to</p> <p>17 do when you were first contacted in this</p> <p>18 litigation?</p> <p>19 MR. GEISE: I just want to</p> <p>20 clarify, you're asking what</p> <p>21 Mr. Hussain talked to him about or</p> <p>22 after that initial meeting with</p> <p>23 counsel?</p> <p>24 Q. (BY MR. KO) Mr. Hussain,</p>
Page 71	Page 73
<p>1 work on the unpublished report, The Effect of</p> <p>2 Behavioral Health Interventions on Healthcare</p> <p>3 Costs, but that was 15 years ago. Other than</p> <p>4 that, no.</p> <p>5 Q. Do you respect Glenn Hubbard?</p> <p>6 A. Professor Hubbard has written</p> <p>7 many papers that I think have contributed to</p> <p>8 my understanding of health economics and</p> <p>9 public finance.</p> <p>10 Q. Earlier today we discussed when</p> <p>11 you were first retained in this litigation,</p> <p>12 and I believe you indicated June of 2018; is</p> <p>13 that correct?</p> <p>14 A. Yes.</p> <p>15 Q. Okay. And who first approached</p> <p>16 you?</p> <p>17 A. It was -- I believe it was</p> <p>18 Mr. Hussain from Cornerstone Research who</p> <p>19 first suggested that I could work on this</p> <p>20 matter.</p> <p>21 Q. And when you say Mr. Hussain,</p> <p>22 was that Michael Hussain?</p> <p>23 A. No, Samid Hussain.</p> <p>24 Q. Samid Hussain.</p>	<p>1 first, yes.</p> <p>2 A. I mean, I don't remember what</p> <p>3 Mr. Hussain told me exactly. I mean, he --</p> <p>4 it may have been as general as there's a</p> <p>5 matter I want to -- you to speak with one</p> <p>6 of -- with an attorney about, and not have</p> <p>7 even told me about the topic matter. I just</p> <p>8 don't remember.</p> <p>9 Q. Okay. And without divulging</p> <p>10 the substance of any communications you may</p> <p>11 have had with counsel, when did you first</p> <p>12 become aware of the assignment that you were</p> <p>13 given in this case?</p> <p>14 A. Without -- I mean, I can't</p> <p>15 really answer that without -- I'm sorry, I</p> <p>16 just don't understand the question.</p> <p>17 Q. Well, the question is strictly</p> <p>18 relegated to timing. When did you first get</p> <p>19 the assignment from either Mr. Geise or any</p> <p>20 other counsel about the expert work that you</p> <p>21 were going to provide in this case?</p> <p>22 A. When we first -- yeah, I mean,</p> <p>23 when we first met was when counsel, including</p> <p>24 Mr. Geise, told me about the assignment.</p>

19 (Pages 70 to 73)

Highly Confidential - Subject to Further Confidentiality Review

Page 74	Page 76
<p>1 Q. Okay. And this was June of</p> <p>2 2018?</p> <p>3 A. Yes.</p> <p>4 Q. Okay. And were you aware --</p> <p>5 prior to either discussing with Mr. Hussain</p> <p>6 or Mr. Geise your involvement in this</p> <p>7 litigation, were you aware of lawsuits that</p> <p>8 were brought against manufacturers and</p> <p>9 distributors of prescription opioids?</p> <p>10 A. In a broad sense, yes.</p> <p>11 Q. Okay.</p> <p>12 So you understood, prior to</p> <p>13 your involvement in this case, that lawsuits</p> <p>14 were being brought on behalf of governmental</p> <p>15 agencies against manufacturers and</p> <p>16 distributors of prescription opioids. Is</p> <p>17 that fair to say?</p> <p>18 A. I -- I can't recall what I knew</p> <p>19 exactly a year ago. I had been broadly -- I</p> <p>20 do remember having seen news stories about --</p> <p>21 I don't know if it was this litigation</p> <p>22 specifically, but the general issue of</p> <p>23 litigation by some sets of plaintiffs against</p> <p>24 manufacturers and distributors. I just don't</p>	<p>1 same rate, the \$850 rate that you will charge</p> <p>2 for any trial testimony that you provide in</p> <p>3 this case?</p> <p>4 A. Yes.</p> <p>5 Q. Okay. And I believe you said</p> <p>6 earlier today that you've spent approximately</p> <p>7 350 to 400 hours in connection with this</p> <p>8 litigation. Is that accurate?</p> <p>9 A. Yes.</p> <p>10 Q. And so how much have you billed</p> <p>11 either Jones Day or Walmart, or both, in</p> <p>12 connection with the work that you have done</p> <p>13 in this case?</p> <p>14 A. Well, I've either billed or</p> <p>15 will bill, you know, whatever the 350 to 400</p> <p>16 times 850 is.</p> <p>17 Q. Okay. And do you have an</p> <p>18 understanding of approximately how much that</p> <p>19 is?</p> <p>20 I think --</p> <p>21 A. I could figure it out.</p> <p>22 Q. Sure. I think by my rough</p> <p>23 math, it's probably at least 300,000. Or</p> <p>24 approximately 300,000.</p>
Page 75	Page 77
<p>1 remember whether I was aware of the specific</p> <p>2 litigation or not.</p> <p>3 Q. Sure. And generally speaking,</p> <p>4 and prior to your communications with</p> <p>5 Mr. Geise or any other counsel or Mr. Hussain</p> <p>6 at Cornerstone, did you have any opinions or</p> <p>7 perspectives about the nature of these</p> <p>8 lawsuits?</p> <p>9 A. No.</p> <p>10 Q. You had no opinion regarding</p> <p>11 the merits of these lawsuits?</p> <p>12 A. No.</p> <p>13 Q. Okay. Now, I understand in</p> <p>14 your report that you are charging \$850 an</p> <p>15 hour for your work in this case. Is that</p> <p>16 accurate?</p> <p>17 A. Yes.</p> <p>18 Q. And do you have a different</p> <p>19 rate with respect to the deposition testimony</p> <p>20 you are providing today?</p> <p>21 A. No.</p> <p>22 Q. Okay. And the same question</p> <p>23 with respect to any potential trial testimony</p> <p>24 that you are going to provide. Is it the</p>	<p>1 A. Yeah. That's the right</p> <p>2 ballpark.</p> <p>3 Q. Okay. So you've -- is it</p> <p>4 accurate to say that you've billed around</p> <p>5 \$300,000 for the expert work you have</p> <p>6 provided in this case thus far?</p> <p>7 A. Have billed or will bill.</p> <p>8 Q. Okay. And have you been paid</p> <p>9 in connection with the work that you have</p> <p>10 done in this litigation?</p> <p>11 A. I haven't been paid for all of</p> <p>12 it because I haven't billed yet for all of</p> <p>13 it. I've been paid some, yes.</p> <p>14 Q. Approximately how much have you</p> <p>15 been paid thus far?</p> <p>16 A. I have been paid approximately</p> <p>17 \$200,000.</p> <p>18 Q. And who pays you? In other</p> <p>19 words, who signs the checks?</p> <p>20 A. The checks have come from</p> <p>21 Walmart.</p> <p>22 Q. And can you describe the</p> <p>23 frequency of the checks? Is it -- do you get</p> <p>24 paid on a monthly basis? A quarterly basis?</p>

20 (Pages 74 to 77)

Highly Confidential - Subject to Further Confidentiality Review

<p style="text-align: right;">Page 78</p> <p>1 How frequent do you get paid?</p> <p>2 A. I send bills. I don't send</p> <p>3 them necessarily every month, because there</p> <p>4 were some months when I did not spend much</p> <p>5 time on this matter. And I didn't want to</p> <p>6 waste people's time processing a bill for</p> <p>7 \$850. When I have accrued a substantial</p> <p>8 amount of time, I send a bill to Walmart and</p> <p>9 to Jones Day -- copying Jones Day, and then</p> <p>10 Walmart has sent me checks in the mail.</p> <p>11 Q. Now, a moment ago you described</p> <p>12 that there were some months when you didn't</p> <p>13 work as frequently as others.</p> <p>14 Looking over the course of the</p> <p>15 last year, what were the general time frames</p> <p>16 in which you worked more, relative to other</p> <p>17 months in this case?</p> <p>18 A. The last couple of months have</p> <p>19 been fairly intense because we received</p> <p>20 plaintiffs' expert reports at the -- well, in</p> <p>21 bits and pieces between the end of March and</p> <p>22 mid to end April. And so during that time I</p> <p>23 have spent a lot of time on this matter.</p> <p>24 Q. Other than the March to April</p>	<p style="text-align: right;">Page 80</p> <p>1 defendants in the above referenced litigation</p> <p>2 may use my expert testimony at trial," end</p> <p>3 quote.</p> <p>4 Did I read that correctly?</p> <p>5 A. Yes.</p> <p>6 Q. Do you have a retainer</p> <p>7 agreement or any other type of agreement with</p> <p>8 any other defendant in this case other than</p> <p>9 Walmart?</p> <p>10 A. No.</p> <p>11 Q. Okay. And so how do you</p> <p>12 understand or how have you come to understand</p> <p>13 that other defendants may use your expert</p> <p>14 testimony at trial?</p> <p>15 A. I guess my understanding was</p> <p>16 that if I testify at trial serving as an</p> <p>17 expert for Walmart, other defendants may have</p> <p>18 the ability to use that testimony in their</p> <p>19 role in this litigation.</p> <p>20 Q. And how did you arrive at that</p> <p>21 understanding?</p> <p>22 MR. GEISE: And to the extent</p> <p>23 any of your understanding comes from</p> <p>24 communications with counsel, I</p>
<p style="text-align: right;">Page 79</p> <p>1 time period, were there any other periods of</p> <p>2 time over the course of the past year since</p> <p>3 you were retained in which you've spent a</p> <p>4 substantial amount of time working on this</p> <p>5 case?</p> <p>6 A. I mean, I don't remember my</p> <p>7 distribution of hours over the period prior</p> <p>8 to receipt of the plaintiffs' reports.</p> <p>9 I mean, I just don't remember.</p> <p>10 Q. Have you been retained by</p> <p>11 Walmart ever before as an expert or</p> <p>12 consultant?</p> <p>13 A. No.</p> <p>14 Q. And have you ever worked with</p> <p>15 or been retained by the law firm Jones Day as</p> <p>16 an expert or consultant in the past?</p> <p>17 A. No, I don't think so.</p> <p>18 Q. Okay.</p> <p>19 I'm going to turn to paragraph</p> <p>20 6 of your report, which appears on page 2.</p> <p>21 Let me know when you get there.</p> <p>22 A. Sure.</p> <p>23 Q. Paragraph 6 indicates, "I</p> <p>24 understand that Walmart Inc. and other</p>	<p style="text-align: right;">Page 81</p> <p>1 instruct you not to answer.</p> <p>2 But if you can otherwise</p> <p>3 answer, that's fine.</p> <p>4 THE WITNESS: I will follow</p> <p>5 Mr. Geise's recommendation and not</p> <p>6 answer that.</p> <p>7 Q. (BY MR. KO) Would you agree</p> <p>8 with me, Professor Kessler, that this is --</p> <p>9 what you've set forth in paragraph 6 can be</p> <p>10 characterized as an assumption that you've</p> <p>11 put in your report?</p> <p>12 In other words, aren't you</p> <p>13 assuming that Walmart and other defendants</p> <p>14 may use your expert testimony at trial.</p> <p>15 Would you agree with me?</p> <p>16 A. It's -- I just understand that</p> <p>17 that's a possibility. I don't know -- I'm</p> <p>18 not an expert on the Federal Rules of Civil</p> <p>19 Procedure, so I couldn't tell you if</p> <p>20 that's -- if that's -- if they have that</p> <p>21 ability or not.</p> <p>22 Q. Right. And I'm asking you a</p> <p>23 simple question. Were you told to assume</p> <p>24 that other defendants other than Walmart may</p>

21 (Pages 78 to 81)

Highly Confidential - Subject to Further Confidentiality Review

Page 82	Page 84
<p>1 use your expert testimony at trial?</p> <p>2 MR. GEISE: And again, if the</p> <p>3 communication in question is one with</p> <p>4 counsel, I instruct you not to answer</p> <p>5 it.</p> <p>6 THE WITNESS: I'm going to</p> <p>7 follow Mr. Geise's recommendation and</p> <p>8 not answer the question.</p> <p>9 Q. (BY MR. KO) And I would</p> <p>10 actually ask you to respond to the question,</p> <p>11 because to the extent it was an assumption,</p> <p>12 Mr. Geise, as you know, the assumptions that</p> <p>13 are provided by counsel are discoverable.</p> <p>14 So were you told to assume that</p> <p>15 other defendants may use your testimony at</p> <p>16 trial?</p> <p>17 MR. GEISE: And let me</p> <p>18 interject another objection there.</p> <p>19 I think if it's an assumption</p> <p>20 that forms the basis of his opinions,</p> <p>21 it may be fair game. I don't think</p> <p>22 the assumption you're asking for or</p> <p>23 the content here goes to the basis of</p> <p>24 any of his opinions.</p>	<p>1 MR. BREWER: No worries. It</p> <p>2 happens all the time.</p> <p>3 THE WITNESS: Yes.</p> <p>4 Q. (BY MR. KO) And the Realtime</p> <p>5 conveniently shows that his last name is</p> <p>6 Brewer.</p> <p>7 A. Oh, that's right. Brewer.</p> <p>8 Q. So in addition to Matt Brewer,</p> <p>9 have you spoken with any other counsel</p> <p>10 outside of counsel at Jones Day or at Bartlit</p> <p>11 Beck, where Matt is a lawyer?</p> <p>12 A. No.</p> <p>13 Q. Okay. And when did that</p> <p>14 meeting occur?</p> <p>15 A. I was at a meeting in</p> <p>16 Los Angeles with Mr. Geise, Ms. Castles, and</p> <p>17 Mr. Brewer -- oh, when was it? I believe it</p> <p>18 was -- it was after -- it was just right</p> <p>19 after plaintiffs' experts disclosed their</p> <p>20 reports. So it was either the very end of</p> <p>21 March or the beginning of April.</p> <p>22 Q. And were there any other</p> <p>23 individuals present other than yourself,</p> <p>24 Mr. Geise, Ms. Castles, or Mr. Brewer?</p>
Page 83	Page 85
<p>1 MR. KO: Okay.</p> <p>2 THE WITNESS: In this -- I</p> <p>3 mean, this doesn't affect any of my</p> <p>4 opinions in this matter. It just</p> <p>5 doesn't affect any of my opinions in</p> <p>6 this matter.</p> <p>7 Q. (BY MR. KO) I understand.</p> <p>8 Have you spoken with any other</p> <p>9 counsel outside of counsel at Jones Day about</p> <p>10 the expert work you either have performed or</p> <p>11 may perform in the future in this case?</p> <p>12 A. Yes.</p> <p>13 Q. And without divulging the</p> <p>14 nature or the substance of those</p> <p>15 communications, can you disclose the identity</p> <p>16 of who those counsel were?</p> <p>17 A. Yes. I was at a meeting</p> <p>18 with -- I apologize, I'm blanking out on</p> <p>19 Matt's last name. But with Matt.</p> <p>20 Q. So the record is clear, Matt --</p> <p>21 the Matt who is present at this deposition?</p> <p>22 A. Yes.</p> <p>23 THE WITNESS: I'm sorry, I</p> <p>24 forgot your last name.</p>	<p>1 A. There may have been -- there</p> <p>2 may have been someone on the phone, but I</p> <p>3 just don't remember. I just don't remember</p> <p>4 who it was.</p> <p>5 Q. Were there any individuals from</p> <p>6 Cornerstone on the phone or that attended in</p> <p>7 person?</p> <p>8 A. There may have been a</p> <p>9 Cornerstone -- oh, yes. Mr. DeCesaris was at</p> <p>10 the meeting, yes. He was physically at the</p> <p>11 meeting.</p> <p>12 Q. Okay. So in addition to</p> <p>13 Mr. DeCesaris, Mr. Geise, Ms. Castles,</p> <p>14 Mr. Brewer, were there any other individuals</p> <p>15 that were present at the meeting?</p> <p>16 A. At the physical meeting in Los</p> <p>17 Angeles, no, I don't believe so.</p> <p>18 Q. And how long did that meeting</p> <p>19 last?</p> <p>20 A. Might have been three or four</p> <p>21 hours.</p> <p>22 Q. And Mr. DeCesaris, he was one</p> <p>23 of the individuals that you met with and</p> <p>24 spoke with last week in Menlo Park in</p>

22 (Pages 82 to 85)

Highly Confidential - Subject to Further Confidentiality Review

Page 86	Page 88
<p>1 connection with preparing for this</p> <p>2 deposition; is that accurate?</p> <p>3 A. Yes.</p> <p>4 Q. And remind me who the other</p> <p>5 individual was?</p> <p>6 A. Ms. Cardiff-Hicks.</p> <p>7 C-A-R-D-I-F-F hyphen H-I-C-K-S.</p> <p>8 Q. Now, with respect to the \$850</p> <p>9 per hour rate that you are charging in this</p> <p>10 case, did you negotiate that rate?</p> <p>11 A. No.</p> <p>12 Q. Did you just simply propose</p> <p>13 that rate to counsel and Walmart and they</p> <p>14 accepted?</p> <p>15 A. Yes.</p> <p>16 Q. And is the \$850 rate in line</p> <p>17 with the expert work you've done in the past?</p> <p>18 A. Yes. That's my current hourly</p> <p>19 rate.</p> <p>20 Q. Okay. Going back to the two</p> <p>21 individuals that assisted you at Cornerstone,</p> <p>22 as we have discussed at frequent times</p> <p>23 throughout the course of the day, Cornerstone</p> <p>24 has assisted you in terms of preparing this</p>	<p>1 affiliated with Cornerstone?</p> <p>2 A. I think I have been a senior</p> <p>3 advisor there for five years or so.</p> <p>4 Q. And prior to that, did you have</p> <p>5 a different role?</p> <p>6 A. Yes.</p> <p>7 Q. And what was that different</p> <p>8 role or title?</p> <p>9 A. I don't believe I had a formal</p> <p>10 title at Cornerstone prior to that. I had</p> <p>11 worked with them on some -- both strategic</p> <p>12 consulting and litigation matters in the</p> <p>13 years prior to becoming a senior advisor.</p> <p>14 Q. Okay. And how long would you</p> <p>15 say you worked with Cornerstone and/or been</p> <p>16 affiliated with them?</p> <p>17 A. Gosh. Are you asking when the</p> <p>18 first engagement -- what was the earliest</p> <p>19 engagement that I've ever had that -- with</p> <p>20 which I worked with Cornerstone?</p> <p>21 Q. Sure. Why don't you answer</p> <p>22 that one.</p> <p>23 A. Might have been 15 or 20 years</p> <p>24 ago.</p>
Page 87	Page 89
<p>1 report; correct?</p> <p>2 A. Yes.</p> <p>3 Q. And can you describe to the</p> <p>4 jury what Cornerstone does?</p> <p>5 MR. GEISE: Object to the form.</p> <p>6 THE WITNESS: I'm sorry, do you</p> <p>7 mean in a broad sense or what they did</p> <p>8 in this particular matter?</p> <p>9 Q. (BY MR. KO) The former.</p> <p>10 A. Yes. Cornerstone is a</p> <p>11 litigation support and strategic consulting</p> <p>12 firm. So they provide litigation support</p> <p>13 services and strategic consulting services to</p> <p>14 their clients.</p> <p>15 Q. And I understand you're</p> <p>16 affiliated with Cornerstone; is that</p> <p>17 accurate?</p> <p>18 A. Yes.</p> <p>19 MR. GEISE: Object to the form.</p> <p>20 Q. (BY MR. KO) What's your</p> <p>21 position at Cornerstone, if you have one?</p> <p>22 A. Yes, I'm a senior advisor at</p> <p>23 Cornerstone.</p> <p>24 Q. And how long have you been</p>	<p>1 Q. Okay. And so is it fair to say</p> <p>2 that you regularly work with them for</p> <p>3 purposes of doing expert work in your</p> <p>4 professional capacity?</p> <p>5 MR. GEISE: Object to the form.</p> <p>6 THE WITNESS: I have worked</p> <p>7 with them several times in the past.</p> <p>8 Q. (BY MR. KO) Okay. Is there --</p> <p>9 or are there instances in your professional</p> <p>10 career when you've worked as an expert</p> <p>11 witness in which you do not use Cornerstone</p> <p>12 for litigation support?</p> <p>13 A. Yes.</p> <p>14 Q. Okay. And can you describe</p> <p>15 approximately how many times you have been an</p> <p>16 expert in which they have provided you with</p> <p>17 litigation support?</p> <p>18 A. Could I look at my list of</p> <p>19 testimony?</p> <p>20 Q. Sure.</p> <p>21 A. Because that would help.</p> <p>22 I have it right here, I think.</p> <p>23 Q. It's at the end of Appendix A,</p> <p>24 I believe.</p>

23 (Pages 86 to 89)

Highly Confidential - Subject to Further Confidentiality Review

Page 90	Page 92
<p>1 A. So I can certainly tell you on 2 this list, the matter between the State of 3 Washington and Franciscan, I worked with 4 Cornerstone on that. 5 The BRFH versus 6 Willis-Knighton, I worked with Cornerstone on 7 that. 8 Lutz, I believe I did not work 9 with Cornerstone. 10 I believe on the University of 11 California versus Aon Hewitt, I believe I 12 worked with them on that. 13 Bay Area Surgical Management, I 14 worked with them on that. 15 The State Compensation 16 Insurance Fund matter, I worked with them on 17 that. 18 And the ExamWorks matter, I 19 worked with them on that. 20 So that's -- of these six 21 matters I've worked with Cornerstone. 22 Q. Okay. So just so the record is 23 clear, that what you were reading from 24 indicates the testimony -- the expert</p>	<p>1 couldn't give you a good count. Probably -- 2 I would guess maybe another four or five. 3 Q. So fair to say that you've 4 worked with Cornerstone approximately ten to 5 11 times over the course of your professional 6 career as an expert witness? 7 A. That's a reasonable estimate. 8 Q. And how many times have you 9 been retained as an expert in your 10 professional career? 11 A. Do you mean as a testifying 12 expert? 13 Q. Sure, let's start there. How 14 many times have you been retained as a 15 testifying expert in your professional 16 career? 17 A. So there are the nine times in 18 the past four years. Prior to that, maybe 19 another five or six times. Or maybe four 20 times. I'm not sure. 21 Q. Okay. So fair to say you've 22 been retained as a testifying expert over the 23 course of your professional career 24 approximately 15 to -- 14 to 15 times?</p>
Page 91	Page 93
<p>1 testimony you've provided in the last four 2 years; correct? 3 A. Yes. 4 Q. And you have listed nine such 5 engagements, and you've indicated that you've 6 worked with Cornerstone in six of those nine 7 engagements; correct? 8 A. Yes. 9 Q. And prior to the testimony that 10 you provided in the last four years, have you 11 also worked with Cornerstone? 12 MR. GEISE: Asked and answered. 13 THE WITNESS: Yes. 14 Q. (BY MR. KO) In addition to 15 those -- in addition to the six times listed 16 here, approximately how many times did you 17 work with Cornerstone? 18 A. Prior to the past 4 years this 19 testimony was? 20 Q. Correct. 21 A. Oh, gosh. 22 I mean, I just -- I don't 23 remember. At least a few -- I mean, I can 24 remember a couple of cases, but I -- I just</p>	<p>1 A. Yeah. That's a -- that's a 2 fair estimate. 3 Q. Okay. 4 Have you also been retained 5 ever in your professional career as a 6 non-testifying expert or a consultant? 7 A. Yes. 8 Q. Approximately how many times 9 have you been retained as a non-testifying 10 expert or consultant? 11 A. Are you including with regard 12 to strategic consulting and non-litigation 13 matters? 14 Q. Let's start with litigation 15 matters first. How many times have you been 16 retained as a non-testifying expert or 17 consultant in litigation matters? 18 A. Maybe another four times. 19 Q. And with -- 20 A. Yeah. I don't -- I'm not sure. 21 Q. Sure. 22 And with respect to the 23 strategic consulting in non-litigation 24 matters that you referenced before,</p>

24 (Pages 90 to 93)

Highly Confidential - Subject to Further Confidentiality Review

Page 94	Page 96
<p>1 approximately how many times have you been</p> <p>2 engaged in that capacity?</p> <p>3 A. Would you include executive</p> <p>4 training as part of that also?</p> <p>5 Q. What do you mean by executive</p> <p>6 training?</p> <p>7 A. Holding classes for executives</p> <p>8 of insurers and healthcare companies.</p> <p>9 Q. Yes, let's count those.</p> <p>10 A. If you include my executive</p> <p>11 teaching engagements and strategic</p> <p>12 consulting, I don't know, maybe another ten</p> <p>13 times I've been engaged by different</p> <p>14 entities.</p> <p>15 Q. Okay. So excluding the</p> <p>16 executive teaching engagements and strategic</p> <p>17 consulting engagements, is it fair to say</p> <p>18 that you've been retained as either a</p> <p>19 testifying expert or a non-testifying expert</p> <p>20 or consultant in litigation matters</p> <p>21 approximately 20 times?</p> <p>22 A. Over the past 20 years? Yeah,</p> <p>23 that sounds like a fair estimate.</p> <p>24 Q. How about with respect to your</p>	<p>1 the amounts they charge in connection with</p> <p>2 this litigation?</p> <p>3 A. I don't think so.</p> <p>4 Q. Okay. And with respect to the</p> <p>5 rate sheets you've seen over the years, do</p> <p>6 you have an approximate -- or do you have an</p> <p>7 understanding of the approximate rates they</p> <p>8 have charged?</p> <p>9 A. Only very approximately. It's</p> <p>10 been a while since I looked at this.</p> <p>11 Q. And to your best recollection,</p> <p>12 what is the approximate rate that you recall</p> <p>13 seeing?</p> <p>14 A. It varies depending on the type</p> <p>15 of service, the level of employee that</p> <p>16 they're working with.</p> <p>17 It would just be speculating to</p> <p>18 try to reconstruct my memory of this. It's</p> <p>19 just too long ago.</p> <p>20 Q. In connection with the work</p> <p>21 that you're performing in this case, do you</p> <p>22 have a primary point of contact at</p> <p>23 Cornerstone?</p> <p>24 A. I do. I speak with both</p>
Page 95	Page 97
<p>1 entire professional career? I'm just trying</p> <p>2 to make sure the record is clear. So with</p> <p>3 respect to your entire professional career,</p> <p>4 is it fair to say that you've been engaged as</p> <p>5 either a testifying expert or a</p> <p>6 non-testifying expert or consultant in</p> <p>7 litigation matters approximately 20 times?</p> <p>8 A. Yes.</p> <p>9 Q. Now, with respect to the work</p> <p>10 that Cornerstone has done in this case, do</p> <p>11 you know how much they charge?</p> <p>12 A. No.</p> <p>13 Q. Have you seen any invoices or</p> <p>14 an accounting or itemization of hours they</p> <p>15 have spent on this matter?</p> <p>16 A. No.</p> <p>17 Q. You do know the rates that</p> <p>18 individuals at Cornerstone charge for their</p> <p>19 work as a litigation support firm?</p> <p>20 A. I've seen some of their rate</p> <p>21 sheets over the years, but I -- just sitting</p> <p>22 here today, I don't remember exactly what</p> <p>23 they are.</p> <p>24 Q. Have you seen a rate sheet for</p>	<p>1 Ms. Cardiff-Hicks and Mr. DeCesaris.</p> <p>2 Q. So is it fair to say that they</p> <p>3 are your primary contacts?</p> <p>4 A. Yes.</p> <p>5 Q. Okay. And what are their</p> <p>6 positions at Cornerstone?</p> <p>7 A. Mr. DeCesaris's position is the</p> <p>8 director of data analytics. And</p> <p>9 Ms. Cardiff-Hicks is a manager, or she may be</p> <p>10 a -- called a senior manager. I'm not sure</p> <p>11 what -- exactly.</p> <p>12 Q. And prior to the work you have</p> <p>13 performed in this case, have you -- or had</p> <p>14 you had the occasion to work with either of</p> <p>15 them in any of your prior expert work in</p> <p>16 which they supported you?</p> <p>17 A. Yes.</p> <p>18 Q. And who did you -- which one of</p> <p>19 the two individuals did you work with before?</p> <p>20 A. I've worked with Mr. DeCesaris</p> <p>21 before.</p> <p>22 Q. Okay. Approximately how many</p> <p>23 times?</p> <p>24 A. Maybe four? Three or four</p>

25 (Pages 94 to 97)

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<p style="text-align: right;">Page 98</p> <p>1 times. I'm not sure.</p> <p>2 Q. Do you know the approximate</p> <p>3 rate that he charges in this litigation?</p> <p>4 A. I don't.</p> <p>5 Q. Okay. In your prior work with</p> <p>6 Cornerstone, have you ever seen the actual</p> <p>7 invoices or bills that they have submitted?</p> <p>8 A. No. I don't think I have, no.</p> <p>9 Q. So you've never seen any</p> <p>10 invoice that they've submitted in connection</p> <p>11 with the expert work that they have supported</p> <p>12 you on in your professional career?</p> <p>13 A. No. I don't review</p> <p>14 Cornerstone's invoices.</p> <p>15 Q. And I'm not necessarily asking</p> <p>16 whether or not you review them or you are</p> <p>17 tasked with reviewing them. I'm just simply</p> <p>18 asking whether or not you've seen any</p> <p>19 invoices or seen any reference to the amounts</p> <p>20 that they've billed in specifically the work</p> <p>21 that they have supported you on as an expert.</p> <p>22 A. I mean, I can't remember. I</p> <p>23 couldn't say that I've never seen anything.</p> <p>24 I just -- but I just don't remember.</p>	<p style="text-align: right;">Page 100</p> <p>1 issues raised by the opioid crisis fit</p> <p>2 underneath the umbrella of a health policy</p> <p>3 problem that you've just described?</p> <p>4 A. Certainly some of the issues in</p> <p>5 this matter fit underneath that umbrella.</p> <p>6 Q. Okay. Have you conducted</p> <p>7 research or published articles on opioid use,</p> <p>8 misuse, or abuse?</p> <p>9 MR. GEISE: Object to the form.</p> <p>10 THE WITNESS: Yes.</p> <p>11 Q. (BY MR. KO) And have you</p> <p>12 written or authored or coauthored any</p> <p>13 articles regarding the use, misuse, or abuse</p> <p>14 of opioids?</p> <p>15 A. Yes.</p> <p>16 Q. And which articles?</p> <p>17 A. It's on my CV.</p> <p>18 Q. So let's start with the</p> <p>19 academic publications. Can you identify for</p> <p>20 me which articles you believe you have</p> <p>21 written or authored or -- that you have</p> <p>22 written or authored or coauthored regarding</p> <p>23 the use, misuse, or abuse of opioids?</p> <p>24 A. There's only one. It's the</p>
<p style="text-align: right;">Page 99</p> <p>1 Q. And are you aware that</p> <p>2 Cornerstone is supporting other defense</p> <p>3 experts in this case?</p> <p>4 A. I became aware of that after</p> <p>5 the expert reports were disclosed.</p> <p>6 Q. Okay. And do you know</p> <p>7 approximately how many experts -- other</p> <p>8 defense experts they're supporting?</p> <p>9 A. I saw the reports of -- I think</p> <p>10 there were two other experts that they were</p> <p>11 supporting, but I'm not -- I don't remember.</p> <p>12 I believe it was two others.</p> <p>13 Q. Okay. Do you believe you have</p> <p>14 a particular expertise in opioids?</p> <p>15 MR. GEISE: Object to the form.</p> <p>16 THE WITNESS: I believe I have</p> <p>17 an expertise in the application of</p> <p>18 microeconomics and empirical data</p> <p>19 analysis to health policy problems and</p> <p>20 healthcare finance problems, and</p> <p>21 opioids are a special case of that.</p> <p>22 So in that sense, yes.</p> <p>23 Q. (BY MR. KO) So is it fair to</p> <p>24 say that the -- or you would agree that the</p>	<p style="text-align: right;">Page 101</p> <p>1 manuscript in progress on the bottom of</p> <p>2 page 7, The Effects of Medicare Advantage on</p> <p>3 Opioid Use.</p> <p>4 Q. Okay. So other than The</p> <p>5 Effects of Medicare Advantage on Opioid Use</p> <p>6 which you coauthored with Lawrence Baker and</p> <p>7 Kate Bundorf, which, as you noted, is an</p> <p>8 academic manuscript in progress, are there</p> <p>9 any other academic or non-academic</p> <p>10 publications that are set forth in your CV</p> <p>11 that are about the use, misuse, or abuse of</p> <p>12 opioids?</p> <p>13 A. No.</p> <p>14 Q. Okay. Have you ever researched</p> <p>15 or published or authored any articles on</p> <p>16 diversion of opioids?</p> <p>17 MR. GEISE: Object to the form.</p> <p>18 THE WITNESS: The -- this NBER</p> <p>19 working paper, the manuscript in</p> <p>20 progress that we're discussing, does</p> <p>21 not touch on diversion specifically,</p> <p>22 so I guess the answer is no.</p> <p>23 Q. (BY MR. KO) And have you ever</p> <p>24 researched or published any articles or</p>


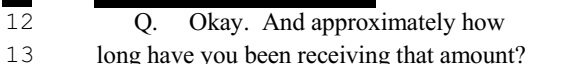
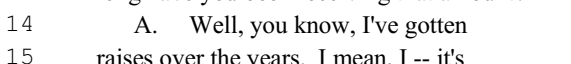
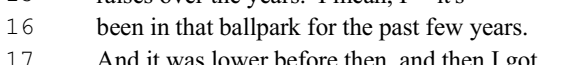
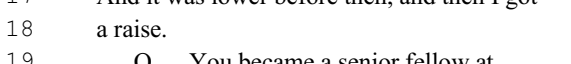
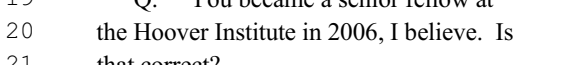
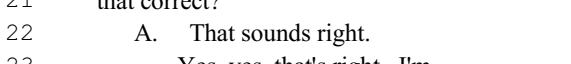
26 (Pages 98 to 101)

Highly Confidential - Subject to Further Confidentiality Review

Page 102	Page 104
<p>1 studies or publications regarding the use, 2 misuse, or abuse of illicit opioids like 3 heroin or fentanyl? 4 A. Do you mean for academic 5 purposes? 6 Q. For any purpose. Because 7 you've listed academic publications and 8 non-academic publications in your CV. 9 A. So I'm sorry, do you mean not 10 including this matter? Do you mean have I 11 done any work on this issue, research on 12 this, not including research done for this 13 matter? Is that what you're asking? 14 Q. That's correct. Outside of the 15 work you've done in connection with preparing 16 this expert report, have you ever done any 17 research or published any academic or 18 non-academic publications regarding the use, 19 abuse, or misuse of illicit opioids like 20 heroin or fentanyl? 21 A. No. 22 Q. And with respect to this 23 academic manuscript in progress, titled The 24 Effects of Medicare Advantage on Opioid Use,</p>	<p>1 an actual academic publication or in a 2 journal for submission to be a peer-reviewed 3 article or study? 4 A. Yes. 5 Q. Okay. And when do you plan on 6 doing that? 7 A. It has been submitted for 8 publication. 9 Q. Which journals did you submit 10 it to? 11 A. It is submitted to the Journal 12 of Health Economics. 13 Q. Okay. Any other journals that 14 it's been submitted to, or is that the only 15 one? 16 A. You're only allowed to submit 17 to one at a time. 18 Q. When did you first begin 19 working on that study? 20 And to be clear, when did you 21 first begin working on The Effects of 22 Medicare Advantage on Opioid Use with 23 Laurence Baker and Kate Bundorf? 24 A. Oh, gosh.</p>
Page 103	Page 105
<p>1 it's essentially a working -- it's also what 2 we could refer to as a working paper. Is 3 that fair to say? 4 A. Yes. 5 Q. And is this working paper 6 peer-reviewed? 7 A. It is reviewed by the NBER to 8 ensure that it meets the NBER's standards for 9 publication as an NBER working paper. It is 10 not peer-reviewed in the sense of a 11 publication. How a publication in the 12 Journal of Health Economics or a medical 13 journal would be peer-reviewed, though, no. 14 Q. And with respect to the review 15 done by the NBER, has that review process 16 taken place yet? 17 A. It has. 18 Q. Okay. And has it been -- and 19 what was the outcome of that review? 20 A. It was approved for 21 publication, for distribution as an NBER 22 working paper. 23 Q. Okay. And do you plan on or 24 otherwise intend to have it be published as</p>	<p>1 I don't remember. 2 Q. Do you recall whether or not it 3 was in 2018 -- or sorry, in 2017? 4 A. It was for sure prior to my -- 5 it was prior to June 2018. I can -- I'm sure 6 of that. 7 Was it -- did we start on this 8 in 2017? I just don't remember. 9 Q. And with respect to that 10 article, I know -- or with respect to the 11 working paper, I know that there's references 12 made to certain stand-alone plans. 13 Is that a fair characterization 14 of that working paper? 15 A. If by stand-alone plans you 16 mean Medicare Part D prescription drug plans 17 that are not part of a Medicare advantage 18 plan, that is correct. 19 Q. That's helpful. That's 20 actually what I was trying to ask. I know 21 that there's various definitions, or at least 22 some people believe there are various 23 definitions of stand-alone plans. 24 In the context of the working</p>

27 (Pages 102 to 105)

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<p style="text-align: right;">Page 106</p> <p>1 paper that we are discussing, what is your 2 definition of a stand-alone plan? 3 A. When this paper uses the term 4 "stand-alone plans," this paper is 5 exclusively about Medicare prescription drug 6 plans. About Medicare prescription drug 7 plans that are part of a Medicare Advantage 8 plan, and Medicare prescription drug plans 9 that are not part of a Medicare Advantage 10 plan, and we use the term "stand-alone plans" 11 in the paper as shorthand for Medicare 12 prescription drug plans that are not part of 13 a stand-alone -- that are not part of a 14 Medicare Advantage plan. 15 Q. Okay. 16 A. Sorry. 17 Q. Thank you for that explanation. 18 Now, in addition to being a 19 professor at Stanford, I also understand that 20 you are a senior fellow at the Hoover 21 Institute; correct? 22 A. Yes, I am a senior fellow at 23 the Hoover Institution. 24 Q. And do you get compensated as a</p>	<p style="text-align: right;">Page 108</p> <p>1 Q. Okay. So in terms of -- 2 separate and apart from the Hoover Institute, 3 but in terms of your role as a professor at 4 the law school and I believe a professor at 5 the business school where you teach one 6 course as a professor -- by courtesy at the 7 medical school, amongst those three schools, 8 is it fair to say that your primary 9 affiliation right now is with the law school? 10 A. No. I would describe my 11 affiliation as split equally between the law 12 school and the Hoover Institution. 13 Q. And I was asking separate from 14 the Hoover Institute. So -- 15 A. Oh. 16 Q. -- in terms of just the schools 17 that you are a professor at, which include, 18 as I understand, the law school, the business 19 school, and the medical school -- 20 How about I ask it this way: 21 You don't receive any compensation from the 22 medical school; correct? 23 A. No, I do not. 24 Q. And you don't receive any</p>
<p style="text-align: right;">Page 107</p> <p>1 senior fellow at the Hoover Institution? 2 A. The Hoover Institution pays 3 part of my university salary. I'm not 4 compensated separately. It's part of 5 Stanford University. 6 Q. I see. And do you know 7 approximately how much they subsidize or 8 otherwise contribute to your salary? 9 A. My time allocation, I'm 10 allocated 50 percent to the law school and 11 50 percent to the Hoover Institution at 12 Stanford. 13 Q. Okay. So is your primary 14 affiliation at Stanford? I know that you are 15 a professor at various schools, but is your 16 primary affiliation with the law school? 17 A. I mean, I -- I'm 50 percent 18 time at the law school and 50 percent time at 19 the Hoover Institution. I'm also a tenured 20 professor at the graduate school of business, 21 where I used to teach 100 percent of the 22 time, but now do not teach for them any more. 23 So I -- they do not pay any part of my salary 24 at present.</p>	<p style="text-align: right;">Page 109</p> <p>1 compensation currently from the business 2 school; correct? 3 A. I do not receive compensation 4 from the business school at Stanford. 5  6  7  8  9  10  11  12 Q. Okay. And approximately how 13 long have you been receiving that amount? 14 A. Well, you know, I've gotten 15 raises over the years. I mean, I -- it's 16 been in that ballpark for the past few years. 17 And it was lower before then, and then I got 18 a raise. 19 Q. You became a senior fellow at 20 the Hoover Institute in 2006, I believe. Is 21 that correct? 22 A. That sounds right. 23 Yes, yes, that's right. I'm 24 just looking at my CV. Yes.</p>

28 (Pages 106 to 109)

Highly Confidential - Subject to Further Confidentiality Review

Page 110	Page 112
<p>1 Q. And is there any difference at</p> <p>2 the Hoover Institute between a senior fellow</p> <p>3 and a fellow?</p> <p>4 A. We -- we have many different</p> <p>5 types of fellows at the Hoover Institution.</p> <p>6 And they're -- it's according to a</p> <p>7 complicated set of university rules.</p> <p>8 A senior fellow is the position</p> <p>9 that's equivalent to a tenured professor.</p> <p>10 Q. Were you ever a fellow at the</p> <p>11 Hoover Institute, or were you always a senior</p> <p>12 fellow at the Hoover Institute in terms of</p> <p>13 your affiliation with that institution?</p> <p>14 A. I was a national fellow in '97,</p> <p>15 '98, and that -- that's a -- I believe that</p> <p>16 position no longer -- well, it may exist.</p> <p>17 That's a sort of one-year visitorship for</p> <p>18 younger people. We now have -- we have other</p> <p>19 positions like research fellow.</p> <p>20 I just -- I don't know what the</p> <p>21 terms of all of them are.</p> <p>22 Q. Fair enough.</p> <p>23 How many -- do you know</p> <p>24 approximately how many senior fellows there</p>	<p>1 Economic Policy Research.</p> <p>2 Q. Now, a moment ago you</p> <p>3 indicated, I believe, that you teach --</p> <p>4 currently teach one class at the business</p> <p>5 school still; is that correct?</p> <p>6 A. I may have said that. The</p> <p>7 more -- a more accurate way to describe that</p> <p>8 class -- and I apologize if I didn't do this</p> <p>9 correctly, is that I teach a university-wide</p> <p>10 class on healthcare, finance, and regulation.</p> <p>11 That class is available to law students,</p> <p>12 business students, medical students, and</p> <p>13 public policy students for credit in their</p> <p>14 departments, and that's the business school</p> <p>15 class that I teach.</p> <p>16 Q. Okay. And do you currently</p> <p>17 teach -- I know you teach at the law school,</p> <p>18 but do you currently teach any courses at the</p> <p>19 medical school? Other than its affiliation</p> <p>20 with this university-wide class that you just</p> <p>21 indicated?</p> <p>22 A. No. That -- that class --</p> <p>23 that's the only medical school class I teach.</p> <p>24 It is listed as a medical school class, and,</p>
Page 111	Page 113
<p>1 are at the Hoover Institute?</p> <p>2 A. I believe the Hoover</p> <p>3 Institution has around 30 senior fellows.</p> <p>4 Q. Now, I also believe you're a</p> <p>5 senior fellow at the Stanford Institute For</p> <p>6 Economic Policy?</p> <p>7 A. At the Stanford Institute For</p> <p>8 Economic Policy Research, yes.</p> <p>9 Q. Thank you. Yes.</p> <p>10 A. Uh-huh.</p> <p>11 Q. And how long have you been a</p> <p>12 senior fellow there?</p> <p>13 A. They appointed me as a senior</p> <p>14 fellow in 2016.</p> <p>15 Q. Okay. And do you get</p> <p>16 compensated in connection with that role?</p> <p>17 A. No, I do not receive</p> <p>18 compensation from the Stanford Institute For</p> <p>19 Economic Policy Research.</p> <p>20 Q. And do you know how many senior</p> <p>21 fellows there are at the Stanford Institute</p> <p>22 For Economic and Policy Research?</p> <p>23 A. I don't know how many senior</p> <p>24 fellows testify at the Stanford Institute For</p>	<p>1 in fact, I teach it with Professor Bundorf.</p> <p>2 Q. Do you have any professional</p> <p>3 licenses, certifications, or accreditations?</p> <p>4 A. No. No, I don't think I do.</p> <p>5 Q. Okay. So you're not licensed</p> <p>6 to practice law anywhere notwithstanding the</p> <p>7 fact that you did go to Stanford Law School?</p> <p>8 A. No, I'm not a member of any</p> <p>9 bar.</p> <p>10 Q. Okay. Were you ever a member</p> <p>11 of any bar?</p> <p>12 A. No.</p> <p>13 Q. Okay. And do you have any</p> <p>14 types of accreditations or licenses with</p> <p>15 respect to finance or accounting? Like for</p> <p>16 example, do you have a CFA or a CPA --</p> <p>17 A. No.</p> <p>18 Q. -- any of those?</p> <p>19 A. No.</p> <p>20 Q. And going back to your</p> <p>21 affiliation with Cornerstone, do you -- have</p> <p>22 you ever received any compensation directly</p> <p>23 from Cornerstone in your professional career?</p> <p>24 A. Yes.</p>

29 (Pages 110 to 113)

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<p style="text-align: right;">Page 114</p> <p>1 Q. Okay. And has this</p> <p>2 compensation always been in connection with</p> <p>3 expert work, or do you receive a separate</p> <p>4 salary or compensation from them?</p> <p>5 Let me ask it this way, because</p> <p>6 it looks like you're confused.</p> <p>7 A. Go ahead.</p> <p>8 Q. Can you describe to me the</p> <p>9 nature of the compensation you received from</p> <p>10 Cornerstone in your professional career?</p> <p>11 A. Yes. I receive a share of the</p> <p>12 billings that they collect on and make from</p> <p>13 cases where they support me, plus they make a</p> <p>14 fixed payment to me on a quarterly basis in</p> <p>15 my role as senior advisor.</p> <p>16 [REDACTED]</p> <p>21 Q. Okay. And has that always been</p> <p>22 the case in terms of your affiliation with</p> <p>23 them? Or when did you start receiving a</p> <p>24 fixed payment from Cornerstone?</p>	<p style="text-align: right;">Page 116</p> <p>1 relative to the total amount of their</p> <p>2 billings for the engagement that they support</p> <p>3 you on?</p> <p>4 A. You know, I'm just not -- I</p> <p>5 don't remember. There are some exclusions</p> <p>6 from the base on which they calculate that,</p> <p>7 and I just don't -- I just don't remember how</p> <p>8 they do it.</p> <p>9 Q. And in the instances in the</p> <p>10 past in which Cornerstone has supported you,</p> <p>11 when do you typically receive the share</p> <p>12 payment? Is it at the conclusion of a</p> <p>13 litigation? Or do you receive periodic</p> <p>14 payments?</p> <p>15 A. I believe that they are</p> <p>16 periodic payments that occur sometime after</p> <p>17 the litigation concludes. I'm not sure.</p> <p>18 Q. Okay. In connection with the</p> <p>19 work you were doing in this case, have you</p> <p>20 received any payments from Cornerstone</p> <p>21 pursuant to the compensation structure that</p> <p>22 you have with them, which includes the fixed</p> <p>23 plus share amount?</p> <p>24 A. No, I have not received any</p>
<p style="text-align: right;">Page 115</p> <p>1 A. I became a senior advisor, I</p> <p>2 believe it was something like five years ago.</p> <p>3 And it was at that point that they began to</p> <p>4 make that payment to me.</p> <p>5 Q. Okay. And with respect to the</p> <p>6 share of the billings that you receive from</p> <p>7 Cornerstone, what percentage of the billings</p> <p>8 do you receive?</p> <p>9 A. It's according to some formula,</p> <p>10 and I don't -- I just don't remember.</p> <p>11 It's -- yeah, I just don't remember the terms</p> <p>12 of the formula. It's in the ballpark of</p> <p>13 sometimes it's 7 percent, sometimes it's more</p> <p>14 than that, and it depends on how the case was</p> <p>15 brought and how it develops.</p> <p>16 Q. Okay. So do you have any</p> <p>17 understanding of the upper bound or upper</p> <p>18 range of the percentage that you received?</p> <p>19 Because I know you said sometimes 7 percent.</p> <p>20 But can you describe to me what the</p> <p>21 approximate range is?</p> <p>22 A. Yeah. Yeah, it's between 7 and</p> <p>23 15 percent.</p> <p>24 Q. And the 7 to 15 percent is</p>	<p style="text-align: right;">Page 117</p> <p>1 payments from them regarding this matter.</p> <p>2 Q. Other than your -- the fixed</p> <p>3 amount that you get on a quarterly basis? Or</p> <p>4 have you not even attained that?</p> <p>5 A. No, they have paid me that, but</p> <p>6 that is not with respect to this matter.</p> <p>7 That's invariant to this matter.</p> <p>8 Q. Got it.</p> <p>9 Now, in connection with the</p> <p>10 expert work you have done in litigation</p> <p>11 matters, and this includes the non-testifying</p> <p>12 expert work and the consultant work that we</p> <p>13 described, is it accurate to say that you've</p> <p>14 done or you've received a substantial amount</p> <p>15 of income in connection with your expert work</p> <p>16 in your professional career?</p> <p>17 MR. GEISE: Object to the form.</p> <p>18 THE WITNESS: I guess I</p> <p>19 don't -- I'm not sure what you mean by</p> <p>20 substantial.</p> <p>21 Q. (BY MR. KO) Yeah, well, why</p> <p>22 don't you describe it to me.</p> <p>23 Do you have an understanding of</p> <p>24 approximately how much income you have</p>

30 (Pages 114 to 117)

Highly Confidential - Subject to Further Confidentiality Review

<p style="text-align: right;">Page 118</p> <p>1 obtained as an expert witness over your 2 professional career? 3 A. Wow. I mean, I haven't added 4 it up over my whole career. 5 Q. Do you have a general 6 understanding of how much that amount is? 7 A. Not really. Could you be more 8 specific? I mean, if you could be more 9 specific, I might be able to give you a more 10 definite answer. 11 Q. Sure. Well, let's take the 12 expert work that you have disclosed in your 13 report over the course of the last four 14 years. 15 Would you -- would it be fair 16 to say that you've obtained at least 17 \$1 million for your services as an expert 18 witness with respect to the nine cases set 19 forth in your report? 20 A. Yes. Over the past four years, 21 that would be fair. 22 Q. Would it be fair to say that 23 you've obtained at least \$2 million for your 24 expert services with respect to these nine</p>	<p style="text-align: right;">Page 120</p> <p>1 connection with these engagements over a 2 million dollars? 3 MR. GEISE: If you know. 4 THE WITNESS: I -- yeah, I just 5 couldn't tell you. It's -- I would -- 6 that sounds like an upper bound to me, 7 because many of these engagements, if 8 I divide a million by ten, were for 9 less than \$100,000. So -- but I -- I 10 just haven't tabulated this statistic 11 from my professional career. 12 Q. (BY MR. KO) Sure. Were there 13 any engagements -- you indicated that many of 14 these engagements were for under \$100,000, 15 but do you recall engagements in which you 16 received over \$100,000? And this is 17 specifically with respect to the additional 18 engagements that are not listed in this 19 expert report. 20 A. Yes. I -- I can think of at 21 least one consulting engagement where I was 22 paid more than \$100,000 that is not listed as 23 a -- where I was not serving as a testifying 24 expert in the past four years.</p>
<p style="text-align: right;">Page 119</p> <p>1 cases? 2 A. That sounds high. That sounds 3 like it's probably an upper bound. 4 Q. So is it fair to say that 5 you've obtained somewhere between 1 to 6 \$2 million for the expert services you've 7 provided that you've set forth in your report 8 over the last four years? 9 A. Yes. Over the past four years, 10 it is fair to say I have obtained 1 to 11 \$2 million in my role as an expert, yes. 12 Q. And in addition to these nine 13 engagements, I think we discussed a moment 14 ago that you've been engaged as a testifying 15 expert or a non-testifying expert or 16 consultant about 10 or 11 additional times; 17 correct? 18 A. This is over the course of my 19 whole career? 20 Q. Correct. 21 A. Yes. 22 Q. And with respect to these 23 additional 10 or 11 engagements, is the 24 amount of income that you have received in</p>	<p style="text-align: right;">Page 121</p> <p>1 Q. You can only think of one in 2 which you obtained six figures or received 3 six figures? 4 A. The -- I can only tell you 5 that -- about one that I remember for sure, 6 yes. 7 Q. Would it be fair to say that 8 you've obtained at least \$2 million of income 9 in connection with your work as an expert or 10 non-testifying expert or consultant in 11 connection with litigation over the course of 12 your professional career? 13 A. Is this including consulting 14 income like strategic consulting and 15 executive teaching? 16 Q. No. We'll get to that in a 17 moment. But I'm asking specifically with 18 respect to the work you've done as either an 19 expert, a non-testifying expert, or a 20 consultant in connection with litigation, is 21 it fair to say that you've obtained at least 22 \$2 million of income in connection with these 23 roles over the course of your professional 24 career?</p>

31 (Pages 118 to 121)

Highly Confidential - Subject to Further Confidentiality Review

Page 122	Page 124
<p>1 A. You know, I just don't know. I</p> <p>2 haven't tallied this up.</p> <p>3 Q. Is it fair to say you've</p> <p>4 received at least \$1.5 million in connection</p> <p>5 with -- \$1.5 million of income in connection</p> <p>6 with your role as an expert, a non-testifying</p> <p>7 expert, or a consultant in connection with</p> <p>8 litigation?</p> <p>9 A. Do you mean over the past</p> <p>10 20 years?</p> <p>11 Q. Over the course of your entire</p> <p>12 professional career.</p> <p>13 A. Yes. That -- that would be</p> <p>14 fair to say.</p> <p>15 Q. Okay. So you've obtained at</p> <p>16 least \$1.5 million of income in connection</p> <p>17 with your work as an expert, a non-testifying</p> <p>18 expert, or a consultant in connection with</p> <p>19 litigation over the course of your</p> <p>20 professional career?</p> <p>21 A. Yes. That's a fair estimate.</p> <p>22 Q. Now, in addition to your work</p> <p>23 as an expert, and, of course, your salary as</p> <p>24 a professor, you have alluded to other</p>	<p>1 consultant to a firm called Press Ganey</p> <p>2 Associates, which is -- or it was the largest</p> <p>3 provider of physician and hospital quality</p> <p>4 surveys. I don't know if they're still the</p> <p>5 largest anymore, but I served as a consultant</p> <p>6 to them with regard to their strategic</p> <p>7 planning and survey development process.</p> <p>8 That was in -- probably between</p> <p>9 2005 and 2010.</p> <p>10 I have served as a consultant</p> <p>11 to -- I teach in the executive program for</p> <p>12 Sutter Health, so that's a -- I've taught in</p> <p>13 the Sutter Health executive program for,</p> <p>14 gosh, maybe ten years now.</p> <p>15 Q. And so you currently are still</p> <p>16 teaching at the Sutter Health executive</p> <p>17 program?</p> <p>18 A. I taught at the Sutter Health</p> <p>19 executive program in April. Yeah, we had a</p> <p>20 session in April.</p> <p>21 Q. Oh, April of this year?</p> <p>22 A. Yes.</p> <p>23 Q. In addition to consulting for</p> <p>24 Press Ganey and Sutter Health, are there any</p>
Page 123	Page 125
<p>1 consulting work that you have done for which</p> <p>2 you have obtained income. Is that accurate?</p> <p>3 A. Yes.</p> <p>4 THE WITNESS: May we take a</p> <p>5 bathroom break? Is that okay?</p> <p>6 MR. KO: Sure. Of course. I</p> <p>7 realized I haven't looked at the time.</p> <p>8 THE VIDEOGRAPHER: The time is</p> <p>9 11:41 a.m. Going off the record.</p> <p>10 (Recess taken, 11:41 a.m. to</p> <p>11 11:50 a.m.)</p> <p>12 THE VIDEOGRAPHER: The time is</p> <p>13 now 11:49. Back on the record.</p> <p>14 Q. (BY MR. KO) Welcome back from</p> <p>15 the break, Professor Kessler.</p> <p>16 Before we broke, we were</p> <p>17 talking about the work you've done as a</p> <p>18 consultant. And can you describe to me the</p> <p>19 types of organizations that you have provided</p> <p>20 consulting services for?</p> <p>21 A. Yes. By this I gather you mean</p> <p>22 non-litigation related?</p> <p>23 Q. Correct.</p> <p>24 A. Yes. So I served as a</p>	<p>1 other organizations or entities that you</p> <p>2 provide consulting services for?</p> <p>3 A. Yes. I've provided consulting</p> <p>4 services to a company called The Medicines</p> <p>5 Company. And this was in -- gosh, when was</p> <p>6 this? Maybe 2010. The Medicines Company is</p> <p>7 a pharmaceutical company that made a</p> <p>8 synthetic anticoagulant, and the question</p> <p>9 that I was investigating for them was whether</p> <p>10 that --</p> <p>11 MR. GEISE: I just want to be</p> <p>12 careful and interrupt here. I don't</p> <p>13 know if the nature of any of these</p> <p>14 other consultations is confidential.</p> <p>15 But before you get into any of the</p> <p>16 substance about what you were doing</p> <p>17 for somebody, I just want to caution</p> <p>18 you to make sure you consider if any</p> <p>19 of that is confidential or not.</p> <p>20 I have no problem with you</p> <p>21 answering the question, but I don't</p> <p>22 know the nature of those other</p> <p>23 consultations.</p> <p>24 THE WITNESS: No, thank you. I</p>

Highly Confidential - Subject to Further Confidentiality Review

Page 126	Page 128
<p>1 appreciate that. I'm only discussing</p> <p>2 non-confidential engagements here.</p> <p>3 My engagement -- my engagement</p> <p>4 with Press Ganey was non-confidential,</p> <p>5 but it actually resulted in an</p> <p>6 academic paper that I wrote with a</p> <p>7 woman who I believe was a sociologist</p> <p>8 there.</p> <p>9 Any engagement with Sutter is</p> <p>10 not confidential. I teach in their</p> <p>11 executive program.</p> <p>12 My engagement with The</p> <p>13 Medicines Company was not</p> <p>14 confidential. That also resulted in</p> <p>15 an academic paper that I wrote with a</p> <p>16 cardiologist and with a fellow -- I</p> <p>17 believe he was an epidemiologist from</p> <p>18 the Premier organization.</p> <p>19 Premier is a hospital group</p> <p>20 purchasing organization that was also</p> <p>21 interested in the research that I was</p> <p>22 conducting for The Medicines Company</p> <p>23 on their synthetic anticoagulant.</p> <p>24 Q. (BY MR. KO) So in addition to</p>	<p>1 So that was the one that I can</p> <p>2 recall would have been in excess of \$100,000.</p> <p>3 The others, I don't really</p> <p>4 recall.</p> <p>5 Q. And the amount that is in</p> <p>6 excess of \$100,000, is that over the course</p> <p>7 of the entire duration of your time</p> <p>8 consulting with them or was that on an annual</p> <p>9 basis?</p> <p>10 A. Not on an annual basis. That</p> <p>11 was over the whole five-year relationship.</p> <p>12 Q. And you have no recollection of</p> <p>13 how much you obtained in connection with your</p> <p>14 consulting services offered to either Sutter</p> <p>15 Health Care or The Medicines Company?</p> <p>16 A. Well, Sutter, I can remember,</p> <p>17 because I just did that. Sutter paid me</p> <p>18 \$7,000 for teaching in their program.</p> <p>19 The Medicines Company, I don't</p> <p>20 remember.</p> <p>21 Q. And was that just a one-time</p> <p>22 fee, or do you get paid by Sutter? With</p> <p>23 respect to Sutter Health, do you get paid</p> <p>24 from them regularly?</p>
Page 127	Page 129
<p>1 Press Ganey, Sutter Health, and The Medicines</p> <p>2 Company, have you ever provided any</p> <p>3 consulting services to any other entities or</p> <p>4 organizations?</p> <p>5 A. I'm trying to remember. This</p> <p>6 was 15 years ago.</p> <p>7 I would estimate they paid</p> <p>8 me -- maybe it was \$20,000 or \$25,000.</p> <p>9 Q. Okay. And what about with</p> <p>10 respect to the unpublished report you</p> <p>11 conducted for the Physician Insurers</p> <p>12 Association of America? Do you recall the</p> <p>13 approximate compensation you received from</p> <p>14 them?</p> <p>15 A. It was in that same ballpark.</p> <p>16 Q. And moving to your role as a</p> <p>17 consultant for the -- for Press Ganey and</p> <p>18 Associates, from 2005 to 2010 or</p> <p>19 approximately that time frame, how much were</p> <p>20 you compensated in connection with those</p> <p>21 consulting services?</p> <p>22 A. I don't remember exactly.</p> <p>23 That was a very big client that</p> <p>24 I worked for over many years.</p>	<p>1 A. Whenever I participate in their</p> <p>2 programs, and they run them -- they don't run</p> <p>3 them on a calendar schedule, they run them</p> <p>4 according to their own needs.</p> <p>5 And so when I participate in</p> <p>6 them, then they pay me. But otherwise, they</p> <p>7 do not pay me a salary.</p> <p>8 Q. Are you aware of the defendants</p> <p>9 that have been named in this litigation? And</p> <p>10 in particular the defendants that are part of</p> <p>11 the trial this fall?</p> <p>12 A. Yes, I am aware of the</p> <p>13 defendants.</p> <p>14 Q. Okay. Have you ever been</p> <p>15 retained by any of the defendants as a</p> <p>16 consultant in the past?</p> <p>17 A. Yes.</p> <p>18 Q. Okay. Which ones?</p> <p>19 A. I was retained by Purdue</p> <p>20 Pharma, not in connection with this</p> <p>21 litigation, but as a consultant for</p> <p>22 consulting services.</p> <p>23 Q. And when was that?</p> <p>24 A. That was in 2016.</p>

Highly Confidential - Subject to Further Confidentiality Review

<p style="text-align: right;">Page 130</p> <p>1 Q. And approximately how long did</p> <p>2 that engagement last with Purdue?</p> <p>3 A. That was approximately a year.</p> <p>4 Q. And what was the nature of the</p> <p>5 consulting services that you provided for</p> <p>6 Purdue?</p> <p>7 MR. GEISE: If you can disclose</p> <p>8 it.</p> <p>9 THE WITNESS: The nature of the</p> <p>10 services was confidential.</p> <p>11 Q. (BY MR. KO) Okay. And how do</p> <p>12 you understand that to be the case in terms</p> <p>13 of the confidential nature of that work?</p> <p>14 A. That's the agreement that I</p> <p>15 signed.</p> <p>16 Q. Okay. So you signed an</p> <p>17 agreement with them?</p> <p>18 A. In connection with my provision</p> <p>19 of consulting services, yes.</p> <p>20 Q. And do you recall approximately</p> <p>21 how much you got paid in connection with the</p> <p>22 consulting services you provided to Purdue?</p> <p>23 A. Yes.</p> <p>24 Q. And how much was that?</p>	<p style="text-align: right;">Page 132</p> <p>1 one-year engagement?</p> <p>2 A. Yeah, I'm concerned -- I'm --</p> <p>3 I'm hesitant to respond because the terms of</p> <p>4 my engagement with them were confidential.</p> <p>5 So I just -- I can't recall if</p> <p>6 the agreement I signed precluded me from</p> <p>7 off -- from giving you a description, an</p> <p>8 answer to that question or not. But I think</p> <p>9 I really -- I mean, I've described the</p> <p>10 engagement. I know that that is not</p> <p>11 confidential, the existence of it. But the</p> <p>12 terms of it are confidential.</p> <p>13 Q. And in connection with -- well,</p> <p>14 do you have a copy yourself of the</p> <p>15 confidential agreement that you signed with</p> <p>16 Purdue?</p> <p>17 A. I did at one time. I don't</p> <p>18 know.</p> <p>19 Q. And do you recall how you</p> <p>20 communicated with the individuals at Purdue?</p> <p>21 Is it by e-mail or by phone or both?</p> <p>22 A. Probably both.</p> <p>23 Q. And did you ever meet with them</p> <p>24 in person?</p>
<p style="text-align: right;">Page 131</p> <p>1 A. It was around \$30,000.</p> <p>2 Q. And they paid you for all those</p> <p>3 services?</p> <p>4 A. Yes.</p> <p>5 Q. Do you have any type of</p> <p>6 arrangement with Purdue currently?</p> <p>7 A. No.</p> <p>8 Q. Do you recall who you worked</p> <p>9 with at Purdue in connection with the</p> <p>10 consulting services you provided?</p> <p>11 A. No, I don't remember that.</p> <p>12 Q. Do you know if you actually</p> <p>13 worked with individuals at Purdue?</p> <p>14 A. Yes.</p> <p>15 Q. But you don't recall their</p> <p>16 names?</p> <p>17 A. Who was it? Yeah, I just don't</p> <p>18 remember that.</p> <p>19 Q. Do you know approximately how</p> <p>20 many individuals you worked with at Purdue?</p> <p>21 A. I spoke with probably five or</p> <p>22 six people.</p> <p>23 Q. And how frequently did you</p> <p>24 communicate with them over the course of this</p>	<p style="text-align: right;">Page 133</p> <p>1 A. I don't remember. I don't</p> <p>2 think so.</p> <p>3 Q. Okay. Do you recall working</p> <p>4 with any other non-Purdue employees in</p> <p>5 connection with this consultation arrangement</p> <p>6 that you had with Purdue?</p> <p>7 A. No.</p> <p>8 Q. Do you recall whether or not</p> <p>9 you reached out to any non-Purdue employees</p> <p>10 in connection with this consultation</p> <p>11 agreement?</p> <p>12 A. I don't recall having done</p> <p>13 that.</p> <p>14 Q. Okay. And I know you said that</p> <p>15 you were -- you had this arrangement for</p> <p>16 approximately one year beginning in 2016. Do</p> <p>17 you have a recollection of when in 2016 this</p> <p>18 arrangement began?</p> <p>19 A. I don't remember.</p> <p>20 Q. Okay. You have no recollection</p> <p>21 of whether or not it was the beginning or the</p> <p>22 middle or the end of 2016?</p> <p>23 A. I just don't remember.</p> <p>24 Q. Now, in addition to the</p>

34 (Pages 130 to 133)

Highly Confidential - Subject to Further Confidentiality Review

Page 134	Page 136
<p>1 consulting work that you've done for Purdue, 2 which you've indicated is confidential 3 pursuant to the terms of the agreement that 4 you've signed with them, have you done any 5 other consulting work for any other defendant 6 in this litigation. 7 A. Not that is not confidential. 8 Q. Okay. And separate and apart 9 from whether or not it is confidential, can 10 you identify the entities for which you have 11 provided consulting services for? Other than 12 Purdue that are also defendants in this 13 litigation? 14 A. No. 15 Q. So no, you can't identify them, 16 or no, you have not provided any consulting 17 services to these entities? 18 A. I -- there are no other 19 entities to whom I've provided consulting 20 services for whom the actual provision of 21 services was not confidential. 22 Q. I see. And I actually just 23 want to make sure the record is clear with 24 respect to the specific defendants in this</p>	<p>1 MR. GEISE: The problem with 2 that, Counsel, is you could then ask 3 about 20. He says no for 18 and can't 4 answer the other two, and by nature of 5 that he's disclosed the information he 6 can't disclose. 7 MR. KO: I understand that if I 8 went through the 20, but I'm just 9 making sure that the record is clear. 10 And I may be a little slow, but I knew 11 where I was going with that question, 12 so I just want to make sure -- 13 MR. GEISE: I figured you did. 14 It was creative, I'll give you credit. 15 But we're not going to start down the 16 first nine and then get to one that 17 Professor Kessler can't answer. 18 So, I mean, I think -- and you 19 can ask the question, but I think the 20 record is clear as to the problem with 21 proceeding. 22 Q. (BY MR. KO) I just want to 23 make sure that the record is clear. So you 24 are -- you have disclosed the fact that you</p>
Page 135	Page 137
<p>1 case. So let me go over some entities and 2 examine whether or not you've actually 3 provided consulting services for them. 4 Have you ever provided any 5 consulting services for Allergan? 6 A. So I can't answer these 7 questions because if I were to answer them, 8 then that would have the possibility of 9 divulging whom I provided or did not provide 10 services to, and those agreements were 11 confidential, so I just can't answer those 12 without violating the agreements that I've 13 signed. 14 Q. So your testimony is that the 15 confidential agreements themselves prevent 16 you from even disclosing the entity? 17 A. Yes. 18 Q. Okay. And you -- if I go 19 through a list, you're unwilling to testify 20 as to whether or not you've actually -- like, 21 for example, if there is an entity in which 22 you did not provide testifying -- or 23 consulting services for, you are not going to 24 disclose that entity either?</p>	<p>1 have been a consultant for Purdue in the 2 past, but you're not willing to disclose the 3 nature of the work that you did for them; 4 correct? 5 A. My agreement with Purdue did 6 not preclude me from saying that I had served 7 as a consultant for them, so I testified as 8 to that. 9 My agreement with Purdue did 10 preclude me from testifying as to the 11 substance of what I performed. I agreed to 12 keep that confidential, yes. 13 Q. And so with respect to other 14 confidential agreements you have, it's your 15 testimony that you cannot disclose the 16 identity of the entities for which you 17 provided consulting services for; is that 18 accurate? 19 A. Yes, those agreements required 20 me to not only keep the substance of the 21 engagement confidential, but also keep the 22 fact that I had worked with the entity 23 confidential. 24 Q. Okay. And with respect to the</p>

35 (Pages 134 to 137)

Highly Confidential - Subject to Further Confidentiality Review

<p style="text-align: right;">Page 138</p> <p>1 time frame that you have been retained by any</p> <p>2 of these entities pursuant to a confidential</p> <p>3 agreement, can you provide approximately when</p> <p>4 you were retained to provide such services?</p> <p>5 A. No. If I were to do that, that</p> <p>6 would be a violation of the agreement that I</p> <p>7 signed.</p> <p>8 Q. Okay. So it's your testimony</p> <p>9 that these confidentiality agreements also</p> <p>10 preclude you from disclosing the time period</p> <p>11 or the date on which you were retained as a</p> <p>12 consultant; correct?</p> <p>13 A. The confidentiality agreements</p> <p>14 I signed precluded me from identifying the</p> <p>15 entity, the work, or the timing of the work.</p> <p>16 All of those matters were -- I agreed to keep</p> <p>17 confidential.</p> <p>18 Q. Okay. And do you have copies</p> <p>19 of these confidentiality agreements?</p> <p>20 A. I did at one time. I don't</p> <p>21 know.</p> <p>22 Q. Okay. And so how is it that</p> <p>23 you recall that you're precluded from</p> <p>24 disclosing both the entity and the time</p>	<p style="text-align: right;">Page 140</p> <p>1 Q. So the confidentiality</p> <p>2 agreements that you have with these other</p> <p>3 entities that are defendants in this</p> <p>4 litigation, is it fair to say that those</p> <p>5 confidentiality agreements preclude you from</p> <p>6 disclosing anything about the nature of that</p> <p>7 arrangement?</p> <p>8 A. That's my recollection. I</p> <p>9 mean, I -- I didn't -- I don't have them here</p> <p>10 today, but my recollection is that I agreed</p> <p>11 not to disclose that information.</p> <p>12 Q. Okay. And do you have an</p> <p>13 understanding or can you provide me with a</p> <p>14 general estimate for how much you've been</p> <p>15 paid in connection with the consulting</p> <p>16 services you have provided outside of the</p> <p>17 consulting service arrangement you have with</p> <p>18 Purdue?</p> <p>19 A. No. That would be covered by</p> <p>20 the confidentiality agreements. And I can't</p> <p>21 remember. I mean, I can't remember anyway,</p> <p>22 but that would certainly be covered.</p> <p>23 Q. Okay. So it's your testimony</p> <p>24 that the confidentiality agreements also have</p>
<p style="text-align: right;">Page 139</p> <p>1 period for which you were retained as a</p> <p>2 consultant?</p> <p>3 A. Because I remember that the</p> <p>4 agreements said I wasn't supposed to disclose</p> <p>5 the work that I had done.</p> <p>6 Q. And again, so the record is</p> <p>7 clear, the Purdue confidentiality agreement</p> <p>8 does allow you to disclose the timing and the</p> <p>9 entity for which you provided consulting</p> <p>10 services, but nothing else. Is that</p> <p>11 accurate?</p> <p>12 A. Yes.</p> <p>13 Q. Do you recall --</p> <p>14 A. That's right.</p> <p>15 Q. Sorry to interrupt.</p> <p>16 A. No, no.</p> <p>17 Q. Do you recall anything else</p> <p>18 about the agreement you had with Purdue which</p> <p>19 allows you to disclose anything else in</p> <p>20 addition to the entity that you're providing</p> <p>21 services for, the time period for which you</p> <p>22 were retained?</p> <p>23 A. No, I don't -- I don't</p> <p>24 remember.</p>	<p style="text-align: right;">Page 141</p> <p>1 a provision preventing you from disclosing</p> <p>2 the amount that you have received from that</p> <p>3 entity in connection with your consulting</p> <p>4 services; correct?</p> <p>5 A. Well, if I disclosed the amount</p> <p>6 that I received, then that would be</p> <p>7 information that would enable the third party</p> <p>8 to identify, potentially, the entity. So</p> <p>9 yes, that...</p> <p>10 Q. And I appreciate that</p> <p>11 explanation. But I was just asking a simple</p> <p>12 question, and that is whether or not you</p> <p>13 believe that the consulting agreements you</p> <p>14 have with these entities specifically prevent</p> <p>15 you from disclosing the amount you received</p> <p>16 as compensation in connection with your</p> <p>17 consulting services.</p> <p>18 A. Well, I mean, I can't remember</p> <p>19 specifically, but I -- what I remember is the</p> <p>20 answer that I provided you.</p> <p>21 Q. Well, if you can't remember</p> <p>22 specifically, how do you recall that you</p> <p>23 can't disclose the amount that you have</p> <p>24 received from any particular entity that is</p>

Highly Confidential - Subject to Further Confidentiality Review

Page 142	Page 144
<p>1 also a defendant in this litigation in 2 connection with the consulting arrangement 3 you have? 4 A. Because were I to provide that 5 information, that could enable the third 6 party to identify who the entity is. 7 I'm sorry, maybe I'm just not 8 understanding your -- 9 I just really can't give you 10 information that enables you or any third 11 party to identify these organizations when I 12 signed confidentiality agreements that 13 preclude me from doing so. 14 Q. And I'm just simply asking you 15 how you arrived at that understanding and 16 whether or not it was something specific in 17 the provision or something that -- something 18 specific in the provision of that consulting 19 agreement or something else. 20 And all I'm asking is whether 21 or not you recall that there was a specific 22 provision in the consulting agreement with an 23 entity that precluded you from disclosing the 24 amount you obtained as compensation for your</p>	<p>1 in connection with any of these arrangements, 2 consulting arrangements that you have 3 provided consulting services for? 4 MR. GEISE: Asked and answered. 5 THE WITNESS: Yeah, I mean, 6 it -- I mean, Mr. Geise had a fairly 7 clear explanation about this a moment 8 ago. I guess I'm just not 9 understanding. I must just not be 10 understanding the question, because as 11 he said, if I gave you amounts for 12 organizations, then that would -- 13 could enable somebody to back out who 14 the organizations were. But then that 15 would violate the agreements that I 16 signed. 17 Q. (BY MR. KO) Mr. Geise is not 18 the person answering the questions today, 19 and, of course, he is entitled to state his 20 objections for the record. But I am just 21 trying to get an understanding of how it is 22 the case that you have become aware that you 23 are not to disclose the amounts you've 24 received as compensation for consulting</p>
Page 143	Page 145
<p>1 consulting services. 2 A. Oh, gosh. I can't remember. 3 Yeah, I can't recall. 4 Q. But you have a general 5 understanding that you are not to disclose 6 the amounts you've obtained from these 7 entities; correct? 8 A. Because it could enable the 9 third party to identify who the entities are, 10 yes. 11 Q. And how did you arrive at that 12 general understanding? 13 A. That's my -- I mean, that's my 14 understanding of our arrangement. 15 Q. Right. 16 A. That's my reasoning. 17 Q. And so I'm just trying to drill 18 down a little bit in terms of how you arrived 19 at that understanding, because you've said 20 that you don't recall any specific provision. 21 So if you don't recall a specific provision 22 in any of the confidentiality agreements that 23 you've signed, how do you know that you 24 cannot disclose the amount you have received</p>	<p>1 services you've provided for any defendant in 2 this litigation in the past. 3 A. So that -- that's not -- 4 So I don't agree with that 5 statement because I did disclose the amount I 6 received as compensation from Purdue, because 7 that agreement did not preclude me from doing 8 so. 9 Q. Outside of the arrangement you 10 have with Purdue, how did you become aware 11 that you are not to disclose the amounts 12 you've received as compensation from any 13 individual -- any entity that is a defendant 14 in this litigation? 15 MR. GEISE: Asked and answered. 16 THE WITNESS: If I were to 17 disclose the amounts, then that could 18 enable the third party or listener to 19 identify who the organizations are. 20 Q. (BY MR. KO) Okay. Is there 21 any other basis to support your belief that 22 you cannot disclose the amount other than a 23 third party or listener being able to back 24 out the amounts to potentially identify the</p>

37 (Pages 142 to 145)

Highly Confidential - Subject to Further Confidentiality Review

<p style="text-align: right;">Page 146</p> <p>1 entity?</p> <p>2 MR. GEISE: Do you mean other</p> <p>3 than the agreement to itself?</p> <p>4 MR. KO: Well, he -- he</p> <p>5 testified he doesn't recall the</p> <p>6 agreement, so -- the specific</p> <p>7 provisions of the agreement so I'm</p> <p>8 actually not asking other than the</p> <p>9 agreement itself.</p> <p>10 THE WITNESS: Well, it's not</p> <p>11 that I don't recall the agreement.</p> <p>12 Your earlier question was whether I</p> <p>13 recalled a specific provision in the</p> <p>14 agreement targeting amounts. And it</p> <p>15 is true I cannot recall that, but I</p> <p>16 can recall that the agreements</p> <p>17 precluded identification of who the</p> <p>18 parties were. And my concern is that</p> <p>19 if I were to answer your question,</p> <p>20 that could enable you or anyone to</p> <p>21 back out who the parties were, which</p> <p>22 then would put me in the position of</p> <p>23 having violated the agreements that</p> <p>24 I've signed.</p>	<p style="text-align: right;">Page 148</p> <p>1 engagements, including the number, the</p> <p>2 amount, or the time period.</p> <p>3 Q. Right. And I'm not asking you</p> <p>4 the number of times you've been retained by a</p> <p>5 particular entity. I'm simply asking you the</p> <p>6 amount of confidential agreements that you</p> <p>7 have with a defendant in this litigation.</p> <p>8 A. My understanding is that that</p> <p>9 would be a violation -- disclosing that would</p> <p>10 be a violation of my agreements.</p> <p>11 Q. So there are provisions in</p> <p>12 these agreements that say that you can't</p> <p>13 disclose the existence of the agreement</p> <p>14 itself?</p> <p>15 MR. GEISE: Asked and answered.</p> <p>16 THE WITNESS: Yes. That's</p> <p>17 the -- that's the essence of it.</p> <p>18 Q. (BY MR. KO) And so the record</p> <p>19 is clear, you're unwilling to answer the</p> <p>20 amount of times you've been retained as a</p> <p>21 consultant for a defendant that is in this</p> <p>22 litigation other than Purdue; correct?</p> <p>23 MR. GEISE: Object to the form.</p> <p>24 It's not a question of willingness.</p>
<p style="text-align: right;">Page 147</p> <p>1 Q. (BY MR. KO) Understood.</p> <p>2 And can you disclose how many</p> <p>3 such arrangements you have had in the past</p> <p>4 with defendants in this litigation outside of</p> <p>5 Purdue?</p> <p>6 A. No, I can't disclose anything</p> <p>7 about that, because provision of that</p> <p>8 information could enable you or a third party</p> <p>9 to back out who the organizations were, which</p> <p>10 would then place me in violation of the</p> <p>11 confidentiality agreements that I signed.</p> <p>12 Q. Okay. Now we're getting into a</p> <p>13 theoretical problem with math or potentially</p> <p>14 economic problem, but I actually completely</p> <p>15 disagree with the ability to back out</p> <p>16 organizations for the question I asked.</p> <p>17 I am simply asking you the</p> <p>18 number of engagements you have with entities</p> <p>19 that are defendants in this litigation.</p> <p>20 Can you disclose that number?</p> <p>21 A. No, my understanding, except</p> <p>22 for the arrangement with Purdue which I</p> <p>23 described to you, my understanding is that I</p> <p>24 am not to disclose anything about those</p>	<p style="text-align: right;">Page 149</p> <p>1 It's a question of adhering to a</p> <p>2 confidentiality agreement.</p> <p>3 THE WITNESS: Yeah. I mean,</p> <p>4 that -- the problem is that -- it's</p> <p>5 not -- the problem is that I've signed</p> <p>6 agreements that say I am not to</p> <p>7 disclose the existence of this</p> <p>8 agreement, and what you're asking me</p> <p>9 is to violate that term. And I</p> <p>10 just -- that's just -- I can't do that</p> <p>11 because that would be against what</p> <p>12 I've agreed to.</p> <p>13 Q. (BY MR. KO) But you are</p> <p>14 disclosing the fact that such agreements</p> <p>15 exist because you are indicating that you've</p> <p>16 signed such agreements; correct?</p> <p>17 A. I cannot disclose anything</p> <p>18 about agreements where I've said I'm not</p> <p>19 going to disclose anything about the</p> <p>20 agreements. I can't tell you yes, I have or</p> <p>21 no, I haven't, because I've said I wouldn't</p> <p>22 disclose that.</p> <p>23 Q. Well, a moment ago you --</p> <p>24 Well, let me make sure the</p>

38 (Pages 146 to 149)

Highly Confidential - Subject to Further Confidentiality Review

<p style="text-align: right;">Page 150</p> <p>1 record is clear, then. Are you saying that</p> <p>2 no such agreement exists?</p> <p>3 A. I'm saying I cannot disclose --</p> <p>4 when I have entered agreements that say the</p> <p>5 agreement is confidential, the existence of</p> <p>6 the agreement is confidential, I cannot</p> <p>7 disclose whether or not I have entered</p> <p>8 agreements like that. Because were I to do</p> <p>9 that, that would then indicate that I had.</p> <p>10 And so I cannot answer those questions</p> <p>11 without subsequently violating agreements</p> <p>12 that I've signed.</p> <p>13 Q. "Yes" or "no," Professor</p> <p>14 Kessler, have you entered into a</p> <p>15 confidentiality agreement with an entity that</p> <p>16 is a defendant in this litigation outside of</p> <p>17 Purdue?</p> <p>18 MR. GEISE: Asked and answered.</p> <p>19 THE WITNESS: I -- if I were to</p> <p>20 answer that question, that would</p> <p>21 provide you with information that I've</p> <p>22 agreed not to provide. I'm sorry, I</p> <p>23 just cannot -- I don't violate</p> <p>24 agreements that I've signed. I</p>	<p style="text-align: right;">Page 152</p> <p>1 Well, let me ask it this way</p> <p>2 instead of doing some sort of memory test.</p> <p>3 I'll go through some of the law firms, and I</p> <p>4 just want to know whether or not you've been</p> <p>5 retained by them before in the past.</p> <p>6 Have you ever been --</p> <p>7 A. Okay. Go ahead.</p> <p>8 Q. Have you ever been retained by</p> <p>9 Kirkland & Ellis as an expert or a</p> <p>10 consultant?</p> <p>11 A. I'm not sure.</p> <p>12 Q. Okay. How about Arnold &</p> <p>13 Porter? Have you ever been retained by them?</p> <p>14 A. I don't think so.</p> <p>15 Q. How about Holland & Knight?</p> <p>16 A. No. That doesn't sound</p> <p>17 familiar.</p> <p>18 Q. How about O'Melveny?</p> <p>19 A. I don't know. I'm not sure.</p> <p>20 Q. Have you ever been retained by</p> <p>21 Ropes & Gray?</p> <p>22 A. No.</p> <p>23 Q. Have you ever been retained by</p> <p>24 Dechert?</p>
<p style="text-align: right;">Page 151</p> <p>1 apologize.</p> <p>2 Q. (BY MR. KO) But you have</p> <p>3 indicated a moment ago that you entered into</p> <p>4 such agreements. Or do you want to revise</p> <p>5 that answer now?</p> <p>6 MR. GEISE: Object to the form.</p> <p>7 THE WITNESS: Yeah, I cannot</p> <p>8 identify or comment on agreements that</p> <p>9 I've signed that preclude me from</p> <p>10 identifying that the agreement exists.</p> <p>11 I just can't do it one way or</p> <p>12 the other, because to do so would</p> <p>13 indicate that they exist, but then</p> <p>14 that's a violation of the</p> <p>15 confidentiality agreement.</p> <p>16 I apologize if I'm just not</p> <p>17 understanding.</p> <p>18 Q. (BY MR. KO) No, you -- you are</p> <p>19 making the record perfectly clear.</p> <p>20 A. Okay.</p> <p>21 Q. Other than your retention by</p> <p>22 Jones Day in this case, have you ever been</p> <p>23 hired by any other law firms that represent</p> <p>24 defendants in this litigation?</p>	<p style="text-align: right;">Page 153</p> <p>1 A. I don't think so.</p> <p>2 Q. Okay. Have you ever been</p> <p>3 retained by Morgan Lewis?</p> <p>4 A. I don't remember.</p> <p>5 Q. And going back to actually your</p> <p>6 retention by Jones Day in this case, have you</p> <p>7 ever worked with Jones Day before in the</p> <p>8 past?</p> <p>9 MR. GEISE: Asked and answered.</p> <p>10 MR. KO: I apologize for that.</p> <p>11 THE WITNESS: No, I don't think</p> <p>12 so. No, I have not worked with</p> <p>13 Jones Day before.</p> <p>14 Q. (BY MR. KO) Have you ever</p> <p>15 worked with Mr. Geise or Ms. Castles ever</p> <p>16 before?</p> <p>17 A. No.</p> <p>18 Q. Have you worked with Reed --</p> <p>19 has Reed Smith ever engaged you for expert</p> <p>20 services?</p> <p>21 A. I don't think so.</p> <p>22 Q. How about Bingham Greenebaum &</p> <p>23 Doll?</p> <p>24 A. No. That doesn't ring a bell.</p>

Highly Confidential - Subject to Further Confidentiality Review

<p style="text-align: right;">Page 154</p> <p>1 Q. How about Williams & Connolly?</p> <p>2 Have they engaged you as an expert?</p> <p>3 A. I don't remember. Maybe years</p> <p>4 ago. I don't remember.</p> <p>5 Q. What matter was that?</p> <p>6 A. It might have been -- I just --</p> <p>7 yeah, I don't remember.</p> <p>8 Q. Was it just one occasion that</p> <p>9 you -- that you may have worked with them?</p> <p>10 A. It only would have been one</p> <p>11 occasion, and it would have been a long time</p> <p>12 ago.</p> <p>13 Q. Has Zuckerman Spaeder ever</p> <p>14 engaged you as an expert or consultant?</p> <p>15 A. No.</p> <p>16 Q. How about Covington & Burling?</p> <p>17 A. I don't think so.</p> <p>18 Q. How about Bartlit Beck?</p> <p>19 A. That doesn't sound familiar.</p> <p>20 We could go on the list of</p> <p>21 my -- I could tell you who has engaged me on</p> <p>22 the testimony list, but I -- I just don't</p> <p>23 remember these folks.</p> <p>24 Q. Sure. No, that's fine. We may</p>	<p style="text-align: right;">Page 156</p> <p>1 Q. When is the last time you</p> <p>2 provided -- when was the last time that you</p> <p>3 were provided a fee for speaking?</p> <p>4 A. Would you count executive</p> <p>5 teaching as speaking? Or is that sort of</p> <p>6 separate?</p> <p>7 Q. Well, we've kind of gone over</p> <p>8 that already, unless there's something else</p> <p>9 that you want to add to that. But yeah, I'm</p> <p>10 talking outside of your executive teaching</p> <p>11 role.</p> <p>12 A. I see.</p> <p>13 Q. Are there any other speaking</p> <p>14 engagements for which you've been compensated</p> <p>15 a fee for?</p> <p>16 A. I was a -- I was a speaker at,</p> <p>17 I believe, an event for AHIP, America's</p> <p>18 Health Insurance Plans, in 2010, or so. And</p> <p>19 I think they paid me maybe \$3,000. Or</p> <p>20 \$5,000.</p> <p>21 Have I been a speaker at any</p> <p>22 other events? Not that I can remember.</p> <p>23 Q. And have you ever done any</p> <p>24 consulting work for the government?</p>
<p style="text-align: right;">Page 155</p> <p>1 do it that way, but this is -- we'll just do</p> <p>2 it this way for now.</p> <p>3 How about the law firm Locke</p> <p>4 Lord? Do you recall ever being engaged by</p> <p>5 them?</p> <p>6 A. No.</p> <p>7 No, I don't think so. No.</p> <p>8 Q. How about Cavitch Familo &</p> <p>9 Durkin?</p> <p>10 A. No. That's -- I've never heard</p> <p>11 of that.</p> <p>12 Q. Barnes & Thornburg? Have they</p> <p>13 ever retained you?</p> <p>14 A. No.</p> <p>15 Q. Now, in addition to being an</p> <p>16 expert in providing consulting services, have</p> <p>17 you also ever received income or fees for</p> <p>18 being a speaker?</p> <p>19 A. From -- from anybody?</p> <p>20 Q. Yeah, from any source.</p> <p>21 A. Yes.</p> <p>22 Q. Okay. How frequent would you</p> <p>23 say you've been paid as a speaker?</p> <p>24 A. Not very frequently.</p>	<p style="text-align: right;">Page 157</p> <p>1 A. Yes.</p> <p>2 Q. And when was that, and can you</p> <p>3 describe the nature of the consulting work</p> <p>4 you performed?</p> <p>5 A. Sure. I served as a consultant</p> <p>6 to the Federal Trade Commission in -- maybe</p> <p>7 it was 2005 to 2007, helping them on a report</p> <p>8 on competition in markets for healthcare that</p> <p>9 they were working on.</p> <p>10 I most recently served as an</p> <p>11 expert for the State of Washington in a</p> <p>12 disagreement they were having with an</p> <p>13 integrated delivery system -- some physician</p> <p>14 practices in Washington state over contracts</p> <p>15 that those practices had entered with one</p> <p>16 another.</p> <p>17 I served as an expert for</p> <p>18 the -- I served as a consultant to the</p> <p>19 government of Canada. This was many years</p> <p>20 ago. About their long-run competition policy</p> <p>21 and strategy.</p> <p>22 I believe that's all.</p> <p>23 Q. Okay. And were you compensated</p> <p>24 for the services that you provided to the</p>

40 (Pages 154 to 157)

Highly Confidential - Subject to Further Confidentiality Review

Page 158	Page 160
<p>1 FDC, the State of Washington, and Canada?</p> <p>2 A. Yes.</p> <p>3 Q. Approximately how much?</p> <p>4 A. I really just don't remember.</p> <p>5 I mean, adding it all up, I would imagine</p> <p>6 it's in the neighborhood of \$200,000, or</p> <p>7 maybe -- yeah, something like that. I don't</p> <p>8 remember.</p> <p>9 Q. And this is just with respect</p> <p>10 to the consulting work you've done on behalf</p> <p>11 of state and federal or foreign governments;</p> <p>12 correct?</p> <p>13 A. The State of Washington, the</p> <p>14 Federal Trade Commission, and the government</p> <p>15 of Canada, yes.</p> <p>16 Q. Any other consulting work</p> <p>17 you've done for governments outside of those</p> <p>18 three instances?</p> <p>19 A. Not that I can remember.</p> <p>20 Q. Okay. And I also understand</p> <p>21 that you worked under the McCain campaign in</p> <p>22 2008. Is that fair to say?</p> <p>23 A. I don't think so.</p> <p>24 Q. Did you have any affiliation</p>	<p>1 Now, in connection with the</p> <p>2 expert work that you have provided over the</p> <p>3 course of your career, has there ever been an</p> <p>4 instance in which you've been excluded as an</p> <p>5 expert witness by a court?</p> <p>6 A. No.</p> <p>7 Q. And have there ever been any</p> <p>8 portions of an expert report that you have</p> <p>9 disclosed or submitted in a case which have</p> <p>10 been stricken or excluded?</p> <p>11 A. No.</p> <p>12 Q. How many times have you sat for</p> <p>13 a deposition?</p> <p>14 A. Maybe eight or nine times.</p> <p>15 Q. And over the course of your</p> <p>16 entire professional career?</p> <p>17 A. Yes.</p> <p>18 Q. And have you ever testified</p> <p>19 before Congress?</p> <p>20 A. No.</p> <p>21 Q. Have you testified before any</p> <p>22 federal agency or committee?</p> <p>23 A. Yes.</p> <p>24 Q. When and what were the</p>
Page 159	Page 161
<p>1 with Senator McCain's campaign in 2008?</p> <p>2 A. I -- not that I can remember.</p> <p>3 I may have spoken with some folks there, but</p> <p>4 I -- I had no formal position in the McCain</p> <p>5 campaign.</p> <p>6 Q. Understood. Have you had any</p> <p>7 positions with any political figures or</p> <p>8 campaigns in the past?</p> <p>9 A. No. No formal positions in</p> <p>10 political organizations and campaigns.</p> <p>11 Q. Okay.</p> <p>12 MR. KO: It's 12:32. And I</p> <p>13 indicated that we should break for</p> <p>14 lunch at 12:30. Is now a good time</p> <p>15 for lunch?</p> <p>16 THE WITNESS: Sure. Of course.</p> <p>17 THE VIDEOGRAPHER: The time is</p> <p>18 now 12:31. Going off the record.</p> <p>19 (Recess taken, 12:31 p.m. to</p> <p>20 1:02 p.m.)</p> <p>21 THE VIDEOGRAPHER: Time is now</p> <p>22 1:01. Back on the record.</p> <p>23 Q. (BY MR. KO) Welcome back from</p> <p>24 lunch, Professor Kessler.</p>	<p>1 circumstances?</p> <p>2 A. I testified at the FTC, I</p> <p>3 believe it was once in 2005 and then once</p> <p>4 some years later, I believe.</p> <p>5 Q. Other than your testimony</p> <p>6 before the FTC, have you ever testified</p> <p>7 before any federal agency or committee?</p> <p>8 A. Not that I can recall.</p> <p>9 Q. Have you ever testified before</p> <p>10 a grand jury?</p> <p>11 A. No.</p> <p>12 Q. Have you ever provided any</p> <p>13 testimony or statements or declarations of</p> <p>14 any sort to the FDA?</p> <p>15 A. No.</p> <p>16 Q. Okay. How about the DEA? Have</p> <p>17 you ever provided any testimony or statements</p> <p>18 to the DEA?</p> <p>19 A. No.</p> <p>20 Q. Have you provided any testimony</p> <p>21 or statements to the CDC?</p> <p>22 A. No.</p> <p>23 Q. Okay. Do you own any stock?</p> <p>24 A. Yes.</p>

41 (Pages 158 to 161)

Highly Confidential - Subject to Further Confidentiality Review

<p style="text-align: right;">Page 162</p> <p>1 Q. Do you have any direct stock</p> <p>2 ownership in any pharmaceutical companies?</p> <p>3 A. Do you mean not through a</p> <p>4 mutual fund?</p> <p>5 Q. Correct, that's why I was</p> <p>6 asking direct.</p> <p>7 A. No, I don't think so.</p> <p>8 Q. Do you happen to have any</p> <p>9 patents of any sort?</p> <p>10 A. No.</p> <p>11 Q. Now, we've gone over some</p> <p>12 entities that you have received compensation</p> <p>13 as a consultant and fees for speaker, among</p> <p>14 other things.</p> <p>15 In connection with your</p> <p>16 professional and academic research, have you</p> <p>17 also received funding from any source other</p> <p>18 than the two instances that you -- that we</p> <p>19 went over earlier in your unpublished</p> <p>20 reports?</p> <p>21 A. From any source?</p> <p>22 Q. Correct.</p> <p>23 A. Yes.</p> <p>24 Q. Who have you received funding</p>	<p style="text-align: right;">Page 164</p> <p>1 helpful list.</p> <p>2 In terms of these entities that</p> <p>3 you've received funding from, are all of</p> <p>4 those -- or was -- were all those instances</p> <p>5 of funding in connection with research or</p> <p>6 publications that you were intending to</p> <p>7 author? Or were -- did you receive funding</p> <p>8 from these sources outside of research?</p> <p>9 A. They were for research or</p> <p>10 publications.</p> <p>11 Q. Any entities that you received</p> <p>12 funding from that you just listed a moment</p> <p>13 ago to me that you did not receive for</p> <p>14 research or publication?</p> <p>15 A. No. They were all for research</p> <p>16 or for preparation of publications.</p> <p>17 Q. Are you familiar with a group</p> <p>18 PhRMA, P-H-R-M-A?</p> <p>19 A. Yes.</p> <p>20 Q. Have you ever received any</p> <p>21 funding from them?</p> <p>22 A. Yes. That's the -- that PhRMA</p> <p>23 is the abbreviation for the Pharmaceutical</p> <p>24 Research and Manufacturers of America.</p>
<p style="text-align: right;">Page 163</p> <p>1 from other than the Physicians Insurers</p> <p>2 Association of America or the Pharmaceutical</p> <p>3 Research and Manufacturers of America?</p> <p>4 A. I've received funding from the</p> <p>5 National Science Foundation. I've received</p> <p>6 funding from the National Institutes on</p> <p>7 Aging. The National Institutes on Aging is a</p> <p>8 division of the Department of Health and</p> <p>9 Human Services.</p> <p>10 I've received funding from the</p> <p>11 Agency for Healthcare Policy and Research,</p> <p>12 now called the Agency for Healthcare Research</p> <p>13 and Quality. That's also part of the</p> <p>14 department -- of the U.S. Department of</p> <p>15 Health and Human Services. I've received</p> <p>16 funding from the American Cancer Society.</p> <p>17 I've received funding from the California</p> <p>18 Healthcare Foundation. That was some years</p> <p>19 ago.</p> <p>20 I've received funding from the</p> <p>21 Foundation for Better Health.</p> <p>22 I've received funding from -- I</p> <p>23 think that's comprehensive.</p> <p>24 Q. Okay. Thank you. That was a</p>	<p style="text-align: right;">Page 165</p> <p>1 Q. Thank you for that</p> <p>2 clarification.</p> <p>3 A. Yes.</p> <p>4 Q. And are you familiar with the</p> <p>5 group the Manhattan Institute for Policy</p> <p>6 Research?</p> <p>7 A. Yes.</p> <p>8 Q. Have you ever received any</p> <p>9 funding from them?</p> <p>10 A. I don't think so. I can't</p> <p>11 remember -- but I can't remember. Certainly</p> <p>12 not in the last decade.</p> <p>13 Q. Okay. Is it fair to say or</p> <p>14 accurate to say that you've received funding</p> <p>15 from the pharmaceutical industry?</p> <p>16 MR. GEISE: Object to the form.</p> <p>17 THE WITNESS: Well, I mean, I</p> <p>18 served as a consultant to PhRMA for</p> <p>19 the preparation of this unpublished</p> <p>20 report.</p> <p>21 I served as a consultant to The</p> <p>22 Medicines Company for research on the</p> <p>23 anticoagulant that we discussed</p> <p>24 previously.</p>

42 (Pages 162 to 165)

Highly Confidential - Subject to Further Confidentiality Review

Page 166	Page 168
<p>1 I served as a consultant to</p> <p>2 Purdue.</p> <p>3 I think that's -- I think</p> <p>4 that's it.</p> <p>5 Q. (BY MR. KO) Okay. So is it</p> <p>6 accurate to say that you've received funding</p> <p>7 from the pharmaceutical industry?</p> <p>8 MR. GEISE: Object to the form,</p> <p>9 asked and answered.</p> <p>10 THE WITNESS: The funding from</p> <p>11 the pharmaceutical industry that I</p> <p>12 received is what I just outlined.</p> <p>13 Q. (BY MR. KO) So "yes" or "no,"</p> <p>14 have you -- is it fair to say that you've</p> <p>15 received funding from the pharmaceutical</p> <p>16 industry?</p> <p>17 MR. GEISE: Object to the form,</p> <p>18 asked and answered.</p> <p>19 THE WITNESS: The way I would</p> <p>20 describe it is I have served as a</p> <p>21 consultant in the forms that I've</p> <p>22 described to you and was paid by</p> <p>23 participants in the pharmaceutical</p> <p>24 business. That's how I would describe</p>	<p>1 MR. KO: Thank you, Steve.</p> <p>2 Yes, Appendix B, Materials</p> <p>3 Considered, page 7.</p> <p>4 THE WITNESS: Yep.</p> <p>5 Q. (BY MR. KO) You set forth --</p> <p>6 and carrying on over to page 8, you set forth</p> <p>7 a series of expert reports that you</p> <p>8 considered; is that correct?</p> <p>9 A. Yep.</p> <p>10 Q. And I believe these are all --</p> <p>11 actually all of the expert reports that</p> <p>12 plaintiffs' disclosed on March 25th.</p> <p>13 Are you, in addition to the</p> <p>14 names that we have discussed previously,</p> <p>15 including Professors Gruber, McGuire, Cutler,</p> <p>16 Liebman, Rosenthal, and Lembke, are you</p> <p>17 familiar with any of the other plaintiffs'</p> <p>18 experts in this case?</p> <p>19 A. Well, these weren't all</p> <p>20 disclosed on March 25th, so I can't agree to</p> <p>21 your statement.</p> <p>22 Q. Fair enough. Let me ask it so</p> <p>23 it doesn't have that level of ambiguity for</p> <p>24 you. You've set forth all of the expert</p>
Page 167	Page 169
<p>1 it.</p> <p>2 Q. (BY MR. KO) Okay. I know</p> <p>3 we've gone over your familiarity with some of</p> <p>4 the plaintiffs' experts in this case,</p> <p>5 including professors Gruber, Cutler, McGuire,</p> <p>6 Liebman, and Rosenthal. Are you familiar</p> <p>7 with any other plaintiff expert in this case?</p> <p>8 A. I'm not personal friends with</p> <p>9 anyone. I have heard of and heard</p> <p>10 Professor Lembke speak before. She's a</p> <p>11 colleague of mine at the Stanford School of</p> <p>12 Medicine.</p> <p>13 As for the others, there were a</p> <p>14 lot of them. We could go through the list.</p> <p>15 None ring a bell immediately.</p> <p>16 Q. Turn with me to Appendix A at</p> <p>17 page 7 of your report.</p> <p>18 A. Yep.</p> <p>19 Q. And on that page you list</p> <p>20 expert reports that you considered in</p> <p>21 connection with providing your report in this</p> <p>22 case. Is that accurate to say?</p> <p>23 MR. GEISE: I think you're in</p> <p>24 Appendix B.</p>	<p>1 reports that you've considered for purposes</p> <p>2 of providing your report; correct?</p> <p>3 A. Yes.</p> <p>4 Q. With respect to the plaintiffs'</p> <p>5 experts listed on pages 7 and 8 of your</p> <p>6 Appendix B, other than Professors Cutler,</p> <p>7 McGuire, Gruber, Rosenthal, Liebman, and</p> <p>8 Lembke, do you know and/or are you familiar</p> <p>9 with any other plaintiffs' expert in this</p> <p>10 case?</p> <p>11 A. No.</p> <p>12 Q. Okay. So is it fair to say</p> <p>13 that when you considered and reviewed these</p> <p>14 expert reports, other than Cutler, McGuire,</p> <p>15 Gruber, Rosenthal, Liebman, and Lembke, this</p> <p>16 was -- that was the first time you had</p> <p>17 encountered these names?</p> <p>18 A. Yes. I don't recall having</p> <p>19 heard of any of these people prior to seeing</p> <p>20 their reports.</p> <p>21 Q. Are you familiar with the list</p> <p>22 of defense experts that have been disclosed</p> <p>23 in this case other than, of course, Laurence</p> <p>24 Baker, whom we've discussed before?</p>

43 (Pages 166 to 169)

Highly Confidential - Subject to Further Confidentiality Review

Page 170	Page 172
<p>1 A. No.</p> <p>2 Q. Okay. So you haven't seen a --</p> <p>3 well, have you reviewed any other defense</p> <p>4 expert report in this case?</p> <p>5 A. Yes.</p> <p>6 Q. Which ones?</p> <p>7 A. I've reviewed Professor Baker's</p> <p>8 report. I reviewed Professor -- oh, gosh.</p> <p>9 What's the matter with me? Murphy's report.</p> <p>10 Q. Is that Kevin Murphy?</p> <p>11 A. Kevin Murphy.</p> <p>12 I've reviewed Professor</p> <p>13 Lichtenberg's report.</p> <p>14 I've reviewed -- oh my</p> <p>15 goodness, what's the name of the Columbia law</p> <p>16 school person? How can I have -- be</p> <p>17 forgetting this?</p> <p>18 Q. Is it Justin McCrary?</p> <p>19 A. Justin McCrary. I've reviewed</p> <p>20 Professor McCrary's report.</p> <p>21 Murphy, McCrary, Baker,</p> <p>22 Lichtenberg.</p> <p>23 I believe that's all I've</p> <p>24 reviewed.</p>	<p>1 this case about this -- about your engagement</p> <p>2 or their engagement?</p> <p>3 A. I have -- no, I have not</p> <p>4 communicated with any defense experts about</p> <p>5 either my engagement or their engagement.</p> <p>6 Q. Okay. Now, is it fair to</p> <p>7 say -- and this is my review of some of the</p> <p>8 articles that you've disclosed in your CV,</p> <p>9 but is it fair to say that you are in favor</p> <p>10 of tort reform?</p> <p>11 MR. GEISE: Object to the form.</p> <p>12 THE WITNESS: That's sort of a</p> <p>13 very big question. I think some tort</p> <p>14 reforms can be helpful and some may</p> <p>15 not be helpful.</p> <p>16 Q. (BY MR. KO) And you're right,</p> <p>17 I agree with you, tort reform is a broad</p> <p>18 concept. So let me ask you specifically, is</p> <p>19 it fair to say that you are a -- you have</p> <p>20 taken positions on medical malpractice</p> <p>21 lawsuits?</p> <p>22 A. I have conducted research and</p> <p>23 written about medical malpractice liability</p> <p>24 laws and liability reform, yes.</p>
Page 171	Page 173
<p>1 Q. And did you review all these</p> <p>2 reports after May 10th?</p> <p>3 A. Yes.</p> <p>4 Q. In other words, did you review</p> <p>5 any of these reports prior to their</p> <p>6 disclosure?</p> <p>7 A. No. I was not aware of -- I</p> <p>8 was not aware of the reports prior to their</p> <p>9 disclosure.</p> <p>10 I wasn't aware of any of them</p> <p>11 prior to their disclosure.</p> <p>12 Q. And I believe I've asked this</p> <p>13 before, but you hadn't communicated -- or you</p> <p>14 have not communicated with any other defense</p> <p>15 expert in this case; correct?</p> <p>16 Other than Laurence Baker?</p> <p>17 MR. GEISE: Do you mean about</p> <p>18 the case?</p> <p>19 THE WITNESS: No, that's not --</p> <p>20 MR. KO: About -- yes. Just so</p> <p>21 the record is clear.</p> <p>22 THE WITNESS: Go ahead.</p> <p>23 Q. (BY MR. KO) Have you</p> <p>24 communicated with any other defense expert in</p>	<p>1 Q. And what is the general nature</p> <p>2 of the research and articles that you have</p> <p>3 written about medical malpractice liability</p> <p>4 laws and liability reform?</p> <p>5 A. It would be hard to summarize</p> <p>6 all of that, you know, in -- just in a blurb</p> <p>7 sitting here today.</p> <p>8 But was there a specific -- was</p> <p>9 there a specific article you want -- you were</p> <p>10 interested in or --</p> <p>11 Q. No. Let me ask you this. Have</p> <p>12 you engaged in any political efforts to</p> <p>13 support tort reform?</p> <p>14 MR. GEISE: Object to the form.</p> <p>15 THE WITNESS: I'm not sure I</p> <p>16 understand what you mean by "political</p> <p>17 efforts."</p> <p>18 Q. (BY MR. KO) Have you been</p> <p>19 involved in any organizations or groups or</p> <p>20 been a member of any entity that supports</p> <p>21 tort reform?</p> <p>22 A. I guess I'm still just not sure</p> <p>23 what -- I'm just not sure what you're asking.</p> <p>24 I'm sorry, I just don't understand.</p>

44 (Pages 170 to 173)

Highly Confidential - Subject to Further Confidentiality Review

<p style="text-align: right;">Page 174</p> <p>1 Q. Have you been involved in any</p> <p>2 organizations or groups or been a member of</p> <p>3 any entity that has taken a position on</p> <p>4 medical malpractice liability?</p> <p>5 A. Well, I served as a consultant</p> <p>6 to the Physician Insurer's Association of</p> <p>7 America in connection with the preparation of</p> <p>8 the report that we discussed. And I'm -- I'm</p> <p>9 confident that the Physician Insurer's</p> <p>10 Association of America is in favor of less</p> <p>11 medical malpractice liability.</p> <p>12 Q. Other than this entity, are you</p> <p>13 involved with or affiliated with in any way</p> <p>14 any group that has taken a position on</p> <p>15 medical malpractice liability?</p> <p>16 A. No.</p> <p>17 Q. Okay. I see that you are on</p> <p>18 Appendix B of your report. And let's turn to</p> <p>19 the beginning of Appendix B. And so the</p> <p>20 record is clear, the title of Appendix B is</p> <p>21 Documents Considered List; correct?</p> <p>22 A. Yes.</p> <p>23 Q. And here you list all of the</p> <p>24 documents that you have considered in</p>	<p style="text-align: right;">Page 176</p> <p>1 Q. Got it.</p> <p>2 And so the documents that</p> <p>3 you've actually relied upon to support the</p> <p>4 basis of your opinions that you give in your</p> <p>5 report are a more narrower list or a smaller</p> <p>6 list than the documents that appear here in</p> <p>7 Appendix B; correct?</p> <p>8 A. Yes.</p> <p>9 Q. Okay.</p> <p>10 And with respect to your review</p> <p>11 of all of these documents, did you, in fact,</p> <p>12 review every single document that's listed</p> <p>13 here in Appendix B?</p> <p>14 A. Well, Appendix B contains all</p> <p>15 of the case documents. And the reason I put</p> <p>16 them in there was because counsel made them</p> <p>17 available to me. And over the past year,</p> <p>18 I've looked at many, many of these and did</p> <p>19 not keep record of exactly which ones I read</p> <p>20 and when.</p> <p>21 And so I just asked to include</p> <p>22 all of them because I couldn't remember</p> <p>23 exactly which ones I'd read and when. That's</p> <p>24 with regard to the case documents.</p>
<p style="text-align: right;">Page 175</p> <p>1 connection with preparing your report; is</p> <p>2 that right?</p> <p>3 A. Yes.</p> <p>4 Q. And what is your definition of</p> <p>5 considered?</p> <p>6 A. My definition of considered is</p> <p>7 that I considered the document for whether or</p> <p>8 not it was relevant to my opinions in this</p> <p>9 report.</p> <p>10 Q. And so it's not necessarily the</p> <p>11 case that consider is synonymous with relied</p> <p>12 upon?</p> <p>13 In other words, is it your</p> <p>14 testimony that all of these documents support</p> <p>15 any of the conclusions or bases for your</p> <p>16 conclusions that are contained in your</p> <p>17 report?</p> <p>18 A. Yeah. I don't consider -- I'm</p> <p>19 not -- when I developed this list, I did not</p> <p>20 consider -- I did not form it with the</p> <p>21 understanding that it was identical to</p> <p>22 documents relied upon. The way I think of</p> <p>23 documents relied upon is the ones I cited in</p> <p>24 my report.</p>	<p style="text-align: right;">Page 177</p> <p>1 Q. That's helpful.</p> <p>2 So would it be fair to say that</p> <p>3 all the documents that are listed here,</p> <p>4 including, of course, the case documents that</p> <p>5 you've identified, those are all the</p> <p>6 documents that were made available to you by</p> <p>7 counsel?</p> <p>8 MR. GEISE: Object to the form.</p> <p>9 THE WITNESS: Yeah, I would</p> <p>10 not -- that --</p> <p>11 MR. KO: I'm sorry if I</p> <p>12 misheard you.</p> <p>13 THE WITNESS: Yeah, that's not</p> <p>14 accurate.</p> <p>15 MR. KO: Okay.</p> <p>16 Q. (BY MR. KO) Did you review</p> <p>17 every single one of the documents that you've</p> <p>18 listed as materials considered in this</p> <p>19 Appendix B?</p> <p>20 A. Well, with regard to the case</p> <p>21 documents, I have looked at each of these</p> <p>22 documents at least in passing. I can't</p> <p>23 remember which ones and when.</p> <p>24 The expert reports, I looked at</p>

45 (Pages 174 to 177)

Highly Confidential - Subject to Further Confidentiality Review

Page 178	Page 180
<p>1 each one of the expert reports in the process 2 of determining which reports I would respond 3 to. 4 The depositions, I read 5 Professor Cutler's, Professor Gruber's, and 6 Professor McGuire's depositions. And the 7 academic -- the academic texts are the texts 8 that I cited in my report and that I had been 9 working and studying as part of my academic 10 research. 11 And so to, you know, be fair, I 12 put them all on the list. 13 Q. Right. Thank you for that 14 explanation. And I'm just asking a simple 15 question, is it your testimony that you 16 reviewed every document that you had listed 17 in Appendix B? 18 A. I have -- if by "reviewed," you 19 mean looked at every document, the answer is 20 yes. 21 If by "reviewed," you mean read 22 completely, the answer is no. 23 Q. Okay. Are there documents for 24 which -- and you don't have to identify the</p>	<p>1 you an estimate of the fraction that I 2 read in detail because it occurred 3 over such a long period and there are 4 so many of them. 5 The expert reports, I focused 6 on the reports that I cite in my reply 7 report. 8 The depositions, I read 9 Professor Cutler's, Professor 10 Gruber's, and Professor McGuire's 11 depositions completely. 12 The academic papers, over the 13 past two or three years I have read 14 all of these, from -- more or less 15 start to finish. 16 Q. (BY MR. KO) Let's talk just 17 real briefly about a few of those academic 18 texts that you've reviewed from start to 19 finish. 20 A. Sure. 21 Q. Or more or less start to 22 finish, as you've described, over the past 23 two or three years. There's a couple of 24 textbooks you've set forth in your academic</p>
Page 179	Page 181
<p>1 specific ones, but are there documents for 2 which Cornerstone reviewed for you? 3 A. The Cornerstone people may have 4 reviewed some or all of these documents, but 5 these are documents that I looked at at least 6 once at some point over the past year. 7 Q. Okay. And do you know whether 8 or not Cornerstone, in fact, reviewed any of 9 these documents? 10 A. No. 11 Q. You don't know whether or not 12 they reviewed them? 13 A. I don't. 14 Q. Can you provide an approximate 15 breakdown of how many documents that appear 16 in Appendix B you actually reviewed from 17 start to finish? 18 MR. GEISE: I'll just object to 19 the form as to your definition of 20 "start to finish." 21 THE WITNESS: I mean, the legal 22 documents, you know, I did not read 23 every word of every one of these. 24 I couldn't even begin to give</p>	<p>1 text list; right? 2 Well, I'll turn your attention 3 specifically to page 9 of your report. 4 A. All right. 5 Q. Of Appendix B of your report. 6 There's at least a -- one 7 reference to Professor Gruber's public 8 finance and public policy textbook; correct? 9 A. Oh, yes. 10 Q. And so you've reviewed that two 11 or three times over the past couple of years? 12 MR. GEISE: Object to the form. 13 THE WITNESS: That's -- I don't 14 believe that's my testimony. 15 Q. (BY MR. KO) So your 16 testimony -- I just want to make sure it's 17 clear, you have indicated that there are 18 articles that you set forth in Appendix B of 19 your report; correct? 20 A. Yes. 21 Q. And forgive me if I misheard 22 you, but I believe you said that you had more 23 or less reviewed all of these two or three 24 times over the course of the past few years?</p>

46 (Pages 178 to 181)

Highly Confidential - Subject to Further Confidentiality Review

<p style="text-align: right;">Page 182</p> <p>1 Or did I get that wrong?</p> <p>2 A. Yeah, I think that's just</p> <p>3 simply incorrect. I don't think I said that.</p> <p>4 Q. All right. Have you reviewed</p> <p>5 every single academic text that you've set</p> <p>6 forth in pages 8 through 11 of Appendix B of</p> <p>7 your report?</p> <p>8 A. Yes, I have reviewed all of the</p> <p>9 academic texts I set forth in pages 8 through</p> <p>10 11 of my report, as I have all of the case</p> <p>11 documents. The extent to which I reviewed</p> <p>12 them depended on their relevance to the</p> <p>13 preparation of the report.</p> <p>14 Q. And where it helped inform you</p> <p>15 in providing an opinion or the basis of your</p> <p>16 opinion in your report, you have cited as</p> <p>17 such in the body of your expert report. Is</p> <p>18 that fair to say?</p> <p>19 A. Yes, that's accurate.</p> <p>20 Q. Okay. And with respect to</p> <p>21 Gruber's textbook -- so I just want to make</p> <p>22 sure the record is clear.</p> <p>23 Did you actually, in fact,</p> <p>24 review that entire textbook?</p>	<p style="text-align: right;">Page 184</p> <p>1 Q. And that would be Sections 8.2</p> <p>2 and 8.31; correct?</p> <p>3 A. Yes. That's right.</p> <p>4 Q. And were those listed --</p> <p>5 actually, I won't ask you that.</p> <p>6 And one thing I noticed on the</p> <p>7 case documents that you were provided access</p> <p>8 to, I understand that you have set forth and</p> <p>9 considered a series of discovery requests</p> <p>10 made by both plaintiffs and defendants in</p> <p>11 this case?</p> <p>12 A. Yes.</p> <p>13 Q. Do you recall ever reviewing,</p> <p>14 considering, or relying upon any of the</p> <p>15 responses and objections to those discovery</p> <p>16 requests?</p> <p>17 MR. GEISE: Other than the ones</p> <p>18 listed? Or...</p> <p>19 MR. KO: Other than the ones</p> <p>20 listed.</p> <p>21 MR. GEISE: Okay.</p> <p>22 THE WITNESS: Oh, other than</p> <p>23 the ones listed. No, I -- if it's not</p> <p>24 on this list, I don't think I looked</p>
<p style="text-align: right;">Page 183</p> <p>1 A. I did. I did not read</p> <p>2 Professor Gruber's textbook from cover to</p> <p>3 cover. I did page through it. I bought a</p> <p>4 copy of it and paged through it and looked at</p> <p>5 it.</p> <p>6 Q. And you bought the 5th edition;</p> <p>7 correct?</p> <p>8 A. That is correct.</p> <p>9 Q. And is the Greene Economic --</p> <p>10 Econometric Analysis, 7th edition, that's</p> <p>11 listed right above the Gruber textbook, is</p> <p>12 that also a textbook?</p> <p>13 A. It is.</p> <p>14 Q. And is your testimony the same</p> <p>15 with respect to that textbook, that you</p> <p>16 didn't necessarily read it from cover to</p> <p>17 cover, but when appropriate, you relied on</p> <p>18 relevant portions of it?</p> <p>19 A. I certainly didn't -- well,</p> <p>20 I've -- over the years I've read this</p> <p>21 textbook quite a bit. In preparation for</p> <p>22 this report, I looked only at the sections</p> <p>23 that were cited in the documents considered</p> <p>24 list.</p>	<p style="text-align: right;">Page 185</p> <p>1 at it.</p> <p>2 Q. (BY MR. KO) And you can</p> <p>3 correct me if I'm wrong, but I believe there</p> <p>4 are responses and objections to discovery</p> <p>5 requests made by the defendants -- well, let</p> <p>6 me clarify.</p> <p>7 There are responses and</p> <p>8 objections made by Cleveland, Cuyahoga, and</p> <p>9 Summit Counties. I don't recall seeing</p> <p>10 responses and objections made by any of the</p> <p>11 defendants in this case.</p> <p>12 Do you recall reviewing,</p> <p>13 reading, or otherwise relying upon in any</p> <p>14 manner the responses and objections made by</p> <p>15 any of the defendants in this case?</p> <p>16 A. And these are responses and</p> <p>17 objections that aren't on the document --</p> <p>18 aren't on my documents considered list? Or</p> <p>19 are they on here?</p> <p>20 Q. Well, let's take a moment to</p> <p>21 divorce ourselves from this list. I'll just</p> <p>22 ask you, do you recall reviewing any</p> <p>23 responses and objections made by defendants</p> <p>24 to plaintiffs' discovery requests in this</p>

47 (Pages 182 to 185)

Highly Confidential - Subject to Further Confidentiality Review

Page 186	Page 188
<p>1 case?</p> <p>2 I see that my instruction</p> <p>3 didn't really work because you're still</p> <p>4 looking at the list, but feel free to respond</p> <p>5 however you want.</p> <p>6 A. Any responses made by</p> <p>7 defendants to discovery requests by</p> <p>8 plaintiffs. I can't recall.</p> <p>9 Q. Regardless, all the documents</p> <p>10 that you considered or reviewed to some</p> <p>11 degree are set forth in this Appendix B;</p> <p>12 correct?</p> <p>13 A. Yes. If it's -- if it's not on</p> <p>14 this appendix, I did not consider it.</p> <p>15 Q. Okay. Thank you. That's</p> <p>16 helpful.</p> <p>17 A. With the exception of the</p> <p>18 expert -- the Defendants' expert reports</p> <p>19 which I got after I submitted this and I</p> <p>20 mentioned to you a few minutes ago.</p> <p>21 Q. Correct. So in addition to the</p> <p>22 documents set forth in Appendix B, you have</p> <p>23 reviewed four additional defense expert</p> <p>24 reports. And outside of that universe of</p>	<p>1 look at that.</p> <p>2 Q. Are you aware of all of the</p> <p>3 reliance materials that were disclosed in</p> <p>4 connection with Professor David Cutler's</p> <p>5 report?</p> <p>6 A. Are reliance material -- I</p> <p>7 guess I don't understand.</p> <p>8 Q. Sure. I can ask it more</p> <p>9 specifically.</p> <p>10 Are you aware that in</p> <p>11 connection with the expert reports of</p> <p>12 Professor Gruber, Cutler, Rosenthal, McGuire,</p> <p>13 there was a shared data appendix?</p> <p>14 A. Yes, I am aware of the shared</p> <p>15 data appendix.</p> <p>16 Q. Did you review the shared data</p> <p>17 appendix?</p> <p>18 A. I looked at the file, but I did</p> <p>19 not -- I -- I think, in there, was NCHS data,</p> <p>20 and I did not look at that because I did not</p> <p>21 have permission to do so.</p> <p>22 Q. Other than the NCHS data, do</p> <p>23 you recall reviewing all other aspects of</p> <p>24 that shared data appendix?</p>
Page 187	Page 189
<p>1 documents, you've not looked at any other</p> <p>2 document in this case; correct?</p> <p>3 A. For purposes of forming my</p> <p>4 opinion, that is correct.</p> <p>5 Q. Okay. Now, in going back to</p> <p>6 page 7 of your materials considered -- or</p> <p>7 documents considered list, and in particular</p> <p>8 the expert reports that you set forth, you</p> <p>9 list that you considered, for many of these</p> <p>10 expert reports, the supporting materials</p> <p>11 underlying their expert reports; is that</p> <p>12 correct?</p> <p>13 A. Yes.</p> <p>14 Q. And so did you actually review,</p> <p>15 yourself, all of the supporting materials</p> <p>16 underlying, for example, Professor David</p> <p>17 Cutler's report?</p> <p>18 A. I think the answer is no</p> <p>19 because if by -- if supporting materials</p> <p>20 includes the NCHS data to which -- for which</p> <p>21 I did not have permission to view, I did not</p> <p>22 view that. So if that's a supporting</p> <p>23 material of Professor Cutler, which I -- I</p> <p>24 think it -- it would be classified, I did not</p>	<p>1 A. You know, I couldn't tell you</p> <p>2 that I reviewed all of it because there were</p> <p>3 a lot of files. I looked at it and tried to</p> <p>4 determine which files I had permission to</p> <p>5 review and which I didn't. And then I</p> <p>6 secondarily tried to determine which files</p> <p>7 were relevant and which files weren't. And</p> <p>8 I'm not sure if I reviewed all of them.</p> <p>9 Q. And how did you make that</p> <p>10 determination for identifying which files</p> <p>11 were relevant and which files were not?</p> <p>12 A. I would open them up and see if</p> <p>13 I could figure out what was in them and if I</p> <p>14 could trace back where that file fit into the</p> <p>15 reports. And given that I was constrained in</p> <p>16 time, that I did not receive those materials</p> <p>17 when I understood them to have been due on</p> <p>18 the 25th, I just really had very little time,</p> <p>19 and so I just did the best I could.</p> <p>20 Q. For purposes of identifying</p> <p>21 which materials were relevant and which</p> <p>22 materials were not, did you make that</p> <p>23 determination on your own, or did you receive</p> <p>24 assistance from anyone else?</p>

48 (Pages 186 to 189)

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<p style="text-align: right;">Page 190</p> <p>1 A. I received assistance from both 2 Cornerstone and from Mr. Geise and 3 Ms. Castles. 4 Q. Okay. Anybody else that you 5 received assistance from in identifying which 6 materials were relevant other than 7 individuals at Cornerstone and counsel at 8 Jones Day? 9 A. No. 10 Q. Did counsel, including 11 Mr. Geise and Ms. Castles, identify for you 12 any specific documents to review? 13 MR. GEISE: With respect to any 14 documents we identified for review, I 15 instruct you not to answer because 16 that gets into attorney work product. 17 MR. KO: And I'm not asking you 18 to disclose the identity of the 19 documents. I'm just simply asking 20 whether or not Mr. Geise or 21 Ms. Castles identified documents for 22 you to review. 23 MR. GEISE: You can answer that 24 question.</p>	<p style="text-align: right;">Page 192</p> <p>1 A. Yes. 2 Q. Okay. So your review of all of 3 the documents listed in Appendix B -- and I 4 understand that your review varies by 5 degree -- but all of the hours spent in terms 6 of reviewing these documents are included in 7 the 350 to 400 hours you've spent working on 8 this litigation. Is that accurate to say? 9 A. Well, no, I don't think that's 10 accurate. 11 I mean, yeah, that's not 12 accurate. 13 Q. Okay. So there is time 14 spent -- and I'm just -- this isn't -- 15 A. No, go ahead. 16 Q. This isn't a game or anything. 17 A. No, no. 18 Q. I'm just trying to 19 understand -- I'm trying to perfect the 20 record. 21 The hours spent, you have said, 22 engaged in this litigation, are approximately 23 350 to 400 hours; correct? 24 A. Yes. I agree with that.</p>
<p style="text-align: right;">Page 191</p> <p>1 THE WITNESS: Do you mean in 2 this whole matter? 3 Q. (BY MR. KO) Well, in 4 connection with determining which -- thank 5 you for that clarification -- in connection 6 with determining which documents were 7 relevant or not for purposes of preparing 8 your report. 9 A. They -- yes. Mr. Geise and 10 Ms. Castles certainly identified documents 11 for review that they thought were relevant, 12 but my review of documents was by no means 13 limited to what they recommended or what 14 Cornerstone recommended. I had access to all 15 of these documents, and I spent several hours 16 sifting through them on my own. 17 Q. You've indicated before that 18 you have spent approximately 350 to 400 hours 19 in connection with this litigation; correct? 20 A. Yes. 21 Q. So is the -- does that amount 22 include the time spent reviewing all of the 23 documents that you've said you've sifted 24 through?</p>	<p style="text-align: right;">Page 193</p> <p>1 Q. And I just want to make sure I 2 understand what you just said a moment ago. 3 Are there hours spent beyond the 350 to 4 400 hours that were spent reviewing some of 5 the materials listed in Appendix B? 6 A. Yes. 7 Q. Okay. Approximately how much? 8 A. Oh, gosh. I mean -- I mean, 9 the problem is, is that many of these 10 academic texts listed here are things that 11 I'm reading also for my research purposes. 12 And so, you know, I just don't even know how 13 many hours I've spent on reading some of 14 these academic papers. I -- 15 Q. Out -- 16 A. Many hours. 17 Q. Outside of the academic texts, 18 are there any depositions, expert reports, or 19 case documents that you have -- and/or legal 20 documents that you have reviewed or 21 considered that are not part of the 350 to 22 400 hours you have spent working on this 23 matter? 24 A. No. Any review of depositions,</p>

49 (Pages 190 to 193)

Highly Confidential - Subject to Further Confidentiality Review

Page 194	Page 196
<p>1 expert reports, or case documents would be 2 counted in the 350 to 400 hours. 3 Q. Okay. And then for purposes of 4 the academic publications and texts that you 5 have listed that you've said that you have 6 spent considerable time on, both before or 7 during this engagement in connection with 8 your -- in connection with your work outside 9 of expert work in this litigation, how have 10 you determined what portion of that review is 11 for expert services in this case versus 12 otherwise? 13 A. Well, if I'm reading the 14 document for research purposes, I do not bill 15 the client for it. If I'm reading the 16 document for purposes of developing an expert 17 opinion in this matter, then I do. 18 Q. Okay. And speaking of the 19 expert opinions in this matter, so the record 20 is clear, this report contains all of the 21 opinions that you plan on giving in this case 22 outside of the two exceptions you've noted 23 earlier today; correct? 24 MR. GEISE: Asked and answered.</p>	<p>1 A. I have not been engaged by any 2 other defendant, and nor do I plan on being 3 engaged by any other defendant. 4 Q. And have you had any 5 discussions with any other defendant about 6 potential retention in this matter? 7 A. No. 8 Q. In paragraph -- well, turn to 9 paragraph 4 of your report. 10 You indicate that, "I hold the 11 opinions I expressed in this report to a 12 reasonable degree of certainty in the field 13 of economics." 14 Did I read that correctly? 15 A. Yes. 16 Q. Can you describe to me what you 17 mean by that? 18 A. Yes. What I mean by that is 19 that by the standards in the field of 20 economics, the opinions that I'm offering are 21 supported by the theory and practice of that 22 discipline, as I understand it. 23 Q. And so how certain are you, 24 would you say, of the opinions that you're</p>
Page 195	Page 197
<p>1 THE WITNESS: Yes, outside of 2 the two classes of exceptions that we 3 discussed earlier, that is correct. 4 Q. (BY MR. KO) And the basis, or 5 the bases of all of your opinions that are 6 contained in this report -- actually, strike 7 that. 8 Are there any bases or analyses 9 that you plan on doing in this case that are 10 not contained in your report or are not part 11 of the two classes of opinions that you have 12 reserved the right to opine on? 13 A. No. 14 Q. And I know that we had 15 discussed earlier today the paragraph in your 16 report that says that you may be retained by 17 other -- or that you may -- your expert 18 testimony may be used by other defendants in 19 this case. And I just want to make sure that 20 I understand completely and accurately your 21 testimony in that regard. 22 You don't have or plan on being 23 engaged by any other defendant other than 24 Walmart in this case, is that accurate?</p>	<p>1 giving in this case? 2 MR. GEISE: Object to the form. 3 THE WITNESS: To a reasonable 4 degree of certainty. 5 That's how I would describe it. 6 Q. (BY MR. KO) Okay. And Section 7 3 on the same page sets forth the summary of 8 opinions that you are giving in this report 9 and in this case; correct? 10 A. Yes. 11 Q. And I want to talk just briefly 12 about the NCHS agreement and the opinions 13 that you are giving in connection with that, 14 which we've discussed at various moments 15 today. 16 Is it fair to say that you 17 are -- one of the opinions that you are 18 giving in this case is that you -- you don't 19 believe that plaintiffs' experts had written 20 permission to use the NCHS restricted 21 mortality data? 22 A. No. 23 Q. Okay. Can you help clarify to 24 me what specific opinion you are giving with</p>

Highly Confidential - Subject to Further Confidentiality Review

Page 198	Page 200
<p>1 respect to the NCHS restricted mortality</p> <p>2 data?</p> <p>3 A. It's what I say in my report.</p> <p>4 Q. Which portion?</p> <p>5 A. I'm reading the third sentence</p> <p>6 in paragraph 8. "It is not clear that the</p> <p>7 plaintiffs' experts had written permission to</p> <p>8 use the restricted-use vital statistics data</p> <p>9 for this litigation." That's my opinion.</p> <p>10 Q. And don't you also indicate</p> <p>11 that you weren't comfortable signing the</p> <p>12 agreement presented to you regarding the NCHS</p> <p>13 restricted mortality data?</p> <p>14 A. No, I don't think I said that.</p> <p>15 Q. Well, turn with me to</p> <p>16 paragraph 10 that appears on the bottom of</p> <p>17 page 3 and through the top of page 4.</p> <p>18 A. Okay.</p> <p>19 Q. In the penultimate sentence of</p> <p>20 paragraph 10, you end by saying, "I decline</p> <p>21 to analyze the restricted-use vital</p> <p>22 statistics data for this report."</p> <p>23 Did I read that correctly?</p> <p>24 A. Yes.</p>	<p>1 you've said that you've -- you've indicated</p> <p>2 your opinion on the NCHS issue in this</p> <p>3 report, but sitting here today, could you</p> <p>4 summarize to me what your opinion is with</p> <p>5 respect to the NCHS agreement, why you</p> <p>6 declined to use the restricted mortality</p> <p>7 data?</p> <p>8 MR. GEISE: Object to the form.</p> <p>9 Compound.</p> <p>10 THE WITNESS: It's exactly what</p> <p>11 I -- I guess I -- I've stated my</p> <p>12 opinion in my report. If you have a</p> <p>13 question about -- I could read it to</p> <p>14 you, but...</p> <p>15 I mean, if you have a question</p> <p>16 about my opinion, I'm happy to answer.</p> <p>17 Q. (BY MR. KO) Did you ever see</p> <p>18 the data use agreement offered by NCHS on</p> <p>19 this case for use of restricted mortality</p> <p>20 data?</p> <p>21 A. Well, what I saw was what I say</p> <p>22 in my documents considered list. What I saw</p> <p>23 was a -- well, let me see. I just want to</p> <p>24 make sure and tell you exactly what I saw.</p>
Page 199	Page 201
<p>1 Q. So is it fair to say that --</p> <p>2 well, let's go to the beginning of that</p> <p>3 sentence. You also state that, "Because I</p> <p>4 was not willing to violate the published</p> <p>5 rules of NCHS" -- and there's some further</p> <p>6 language -- you indicate that, "I declined to</p> <p>7 analyze the restricted use vital statistics</p> <p>8 data for this report."</p> <p>9 Do you see that portion of the</p> <p>10 report?</p> <p>11 A. Yes.</p> <p>12 Q. So is it -- and I just want to</p> <p>13 get your understanding of some of the</p> <p>14 opinions you were giving with respect to the</p> <p>15 NCHS restricted mortality data.</p> <p>16 Is it your opinion that you</p> <p>17 believe that plaintiffs' experts should not</p> <p>18 have signed the agreement that they signed in</p> <p>19 order to access the NCHS restricted mortality</p> <p>20 data?</p> <p>21 A. No, that's not -- I don't offer</p> <p>22 that opinion anywhere.</p> <p>23 Q. Okay.</p> <p>24 What is your -- and I know</p>	<p>1 Oh, for goodness sake. How can</p> <p>2 I not find this?</p> <p>3 MR. GEISE: I think you're</p> <p>4 looking for page 11.</p> <p>5 THE WITNESS: Thank you.</p> <p>6 MR. GEISE: Not coaching,</p> <p>7 but --</p> <p>8 THE WITNESS: No, no. Thank</p> <p>9 you. I'm sorry.</p> <p>10 MR. KO: Steve, you coach so</p> <p>11 much.</p> <p>12 THE WITNESS: Yes. So I saw an</p> <p>13 e-mail exchange between you and</p> <p>14 Mr. Knapp. Then I saw an e-mail</p> <p>15 exchange between Ted Miller and you</p> <p>16 and Ms. Ritter.</p> <p>17 And that's --</p> <p>18 MR. KO: I believe there's a</p> <p>19 third e-mail.</p> <p>20 THE WITNESS: And then this</p> <p>21 e-mail from Ms. Bierstein to</p> <p>22 Ms. Welch.</p> <p>23 And so those are the documents</p> <p>24 that I saw.</p>

Highly Confidential - Subject to Further Confidentiality Review

Page 202	Page 204
<p>1 And, you know, in my 20 years 2 of experience, having worked with 3 restricted-use federal data, these 4 documents did not constitute a data 5 use agreement that ought -- would give 6 me permission to analyze and review 7 the NCHS mortality data, and it is for 8 that reason that I declined to do so. 9 MR. KO: Okay. So that's a 10 very helpful explanation. Thank you. 11 Q. (BY MR. KO) So it's your 12 testimony that you reviewed those three 13 pieces of correspondence that we just 14 described, but beyond that you didn't 15 actually see the data use agreement that may 16 have potentially provided you with access to 17 the restricted mortality data? 18 A. Well, as part of this 19 correspondence, I saw a -- there was a 20 fragment of some data use agreement with an 21 organization called PIRE. 22 And that data use agreement was 23 for the use of the NCHS mortality data for 24 PIRE to produce summary statistics for public</p>	<p>1 e-mails for which you described contained 2 fragments of a data use agreement between 3 PIRE -- or involving PIRE. Is that accurate? 4 A. Yes. I believe that was 5 contained in those -- 6 If it's not contained in those 7 three e-mails, then I should have put it on 8 here, because I did see this. And I -- my 9 memory is that it was in these e-mails. But 10 yes, that's right. 11 Q. So other than these three 12 e-mail chains and correspondences, which did 13 include, as you say, fragments of the PIRE 14 data use agreement, did you review any other 15 documents or consider any other documents in 16 determining whether or not you had permission 17 to access the NCHS restricted mortality data? 18 A. Well, actually -- I mean, I -- 19 no other case documents, but I did review the 20 NCHS website to make sure that I had 21 understood correctly that these data were 22 restricted-use to begin with. 23 But yes, that -- aside from 24 that and these documents, that's totally</p>
Page 203	Page 205
<p>1 consumption. That's my memory. But this was 2 an attachment or a fragment of these e-mails. 3 But that had nothing to do with 4 this litigation, and so I had requested from 5 counsel whether there was any other materials 6 that would clarify that I, or, you know, 7 there was some permission in place for use of 8 these data in connection with this 9 litigation. And I did not -- I didn't get 10 anything back from them beyond that which 11 I've described to you. 12 And it was my judgment that the 13 materials that I reviewed, including the 14 portions of what appeared to be a data use 15 agreement with some other organization for 16 some other purpose, that that was all that 17 counsel could provide me. And I felt that 18 basis was insufficient for me to review 19 restricted -- these restricted data. 20 Q. And I just want to make sure 21 the record is clear. So in connection with 22 the NCHS restricted mortality data, the 23 documents you reviewed are the three e-mails 24 that you set forth in Appendix B. One of the</p>	<p>1 accurate. 2 Q. Okay. So other than the NCHS 3 website and the three e-mail correspondence 4 that you set forth in Appendix B, at least 5 one of which contained fragments of the PIRE 6 data use agreement, did you review any other 7 documents or consult with any other source to 8 determine whether or not you had access to 9 the NCHS restricted mortality data? 10 A. No. 11 Q. Okay. Are you aware at all of 12 whether or not other defense experts in this 13 case have signed an agreement that allows 14 them to view the NCHS restricted mortality 15 data? 16 A. No. 17 Q. Are you aware of whether or not 18 other consultants for defense experts in this 19 case, or individuals at the consulting firms 20 for the defense experts in this case, have 21 signed an agreement that allows them to view 22 the NCHS restricted mortality data? 23 A. No. 24 Q. And by the way, do you have any</p>

Highly Confidential - Subject to Further Confidentiality Review

<p style="text-align: right;">Page 206</p> <p>1 understanding of what data was specifically</p> <p>2 restricted by the NCHS that you did not view?</p> <p>3 A. Yes.</p> <p>4 Q. And what was restricted by the</p> <p>5 NCHS that you couldn't examine or view?</p> <p>6 A. My understanding is that the</p> <p>7 county-level data file based on the multiple</p> <p>8 cause of death data, for years after -- I</p> <p>9 believe it's 2005 or later, or maybe 2006 or</p> <p>10 later, are restricted-use only, requiring</p> <p>11 prior agreement from NCHS on a</p> <p>12 project-specific basis for use.</p> <p>13 Q. And is it all the data from</p> <p>14 2006 onwards regarding the multiple cause of</p> <p>15 death, or is it some percentage or portion of</p> <p>16 the death data that is restricted based on</p> <p>17 your understanding?</p> <p>18 A. My understanding is that if the</p> <p>19 source of a -- if one obtains a</p> <p>20 restricted-use file from a federal agency,</p> <p>21 one is not allowed to share that file or use</p> <p>22 it for any purposes other than the purposes</p> <p>23 for which the original use was granted.</p> <p>24 That's my understanding of how data use</p>	<p style="text-align: right;">Page 208</p> <p>1 correspondences that are set forth in</p> <p>2 Appendix B.</p> <p>3 A. Other than the fragments of the</p> <p>4 PIRE agreement or some product of those</p> <p>5 fragments, no.</p> <p>6 Q. What do you mean by "product of</p> <p>7 those fragments"?</p> <p>8 A. Some taking of those fragments</p> <p>9 and putting them in another document. I just</p> <p>10 don't remember all of the things that I had</p> <p>11 looked at but what I can tell you confidently</p> <p>12 is I was presented with no document that</p> <p>13 described the use of the NCHS restricted-use</p> <p>14 mortality data data in this litigation; for</p> <p>15 this matter, I was presented with no document</p> <p>16 of that sort.</p> <p>17 Q. Were you presented with any</p> <p>18 other document other than the fragments of</p> <p>19 the PIRE agreement or, as you say, the</p> <p>20 products of that agreement for you to sign?</p> <p>21 In other words, were you ever</p> <p>22 offered an opportunity to sign an agreement</p> <p>23 such that you could get access to the NCHS</p> <p>24 restricted mortality data?</p>
<p style="text-align: right;">Page 207</p> <p>1 agreements work.</p> <p>2 And so for that reason I choose</p> <p>3 not to analyze that file, because I did not</p> <p>4 receive any permission from NCHS with my name</p> <p>5 on it that said I could analyze the file for</p> <p>6 purposes of this litigation.</p> <p>7 Q. And separate and apart from</p> <p>8 whether or not you saw your name on any</p> <p>9 specific permission form from NCHS, you were</p> <p>10 also not presented with a specific agreement</p> <p>11 that would have granted you such permission;</p> <p>12 correct?</p> <p>13 A. Yeah, I was not offered an</p> <p>14 agreement that I could sign for permission to</p> <p>15 use these data for this litigation. I never</p> <p>16 was offered an agreement like that.</p> <p>17 Q. Yeah. Were you offered an</p> <p>18 agreement of any kind?</p> <p>19 A. Well, it was --</p> <p>20 MR. GEISE: Object to the form.</p> <p>21 Q. (BY MR. KO) Other than the</p> <p>22 one -- other than the fragments of the PIRE</p> <p>23 agreement that you have indicated that you</p> <p>24 reviewed in connection with the e-mail</p>	<p style="text-align: right;">Page 209</p> <p>1 MR. GEISE: Object to the form.</p> <p>2 THE WITNESS: Certainly not</p> <p>3 that -- such that I could get access.</p> <p>4 Because if -- because the document did</p> <p>5 not say it was for the purpose for</p> <p>6 which I would have used the data.</p> <p>7 Q. (BY MR. KO) And I think we're</p> <p>8 talking over each other just a little bit,</p> <p>9 and I'm just -- I'm not trying --</p> <p>10 A. Go ahead.</p> <p>11 Q. -- to trick you. I don't think</p> <p>12 you're trying to trick me.</p> <p>13 A. No, no, of course not.</p> <p>14 Q. I'm just trying to ask a simple</p> <p>15 question. What -- can you identify for me</p> <p>16 all of the documents that were presented to</p> <p>17 you for which you had an opportunity to</p> <p>18 access the NCHS restricted mortality data?</p> <p>19 A. For purposes of this litigation</p> <p>20 or for any purpose?</p> <p>21 Q. For purposes of this</p> <p>22 litigation, can you identify for me all of</p> <p>23 the documents that you were presented for</p> <p>24 which you had an opportunity to access the</p>

Highly Confidential - Subject to Further Confidentiality Review

Page 210	Page 212
<p>1 NCHS restricted mortality data?</p> <p>2 A. I was presented with no</p> <p>3 document that provided me an opportunity to</p> <p>4 access the NCHS mortality data for purposes</p> <p>5 of this litigation.</p> <p>6 Q. Can you -- for purposes of this</p> <p>7 litigation, can you identify for me all of</p> <p>8 the documents that were presented to you for</p> <p>9 which you had a potential opportunity to</p> <p>10 access the NCHS restricted mortality data</p> <p>11 separate and apart from whether or not you</p> <p>12 believed you could get access to such data?</p> <p>13 MR. GEISE: Object to the form.</p> <p>14 Argumentative and compound.</p> <p>15 THE WITNESS: I was presented</p> <p>16 with no document that provided me an</p> <p>17 opportunity to access the NCHS</p> <p>18 mortality data for purposes of this</p> <p>19 litigation.</p> <p>20 Q. (BY MR. KO) Were you provided</p> <p>21 with any document from counsel containing the</p> <p>22 words NCHS?</p> <p>23 A. Yes.</p> <p>24 Q. Can you describe to me what</p>	<p>1 So I -- I just -- it was -- it wasn't</p> <p>2 something that made any sense for me to sign.</p> <p>3 Q. Regardless of whether or not</p> <p>4 you believed that there was any sense to</p> <p>5 signing it, you did not sign any agreements</p> <p>6 in this case that would have potentially</p> <p>7 allowed you access to the NCHS restricted</p> <p>8 mortality data; is that correct?</p> <p>9 A. That document would not have</p> <p>10 potentially allowed me access because it did</p> <p>11 not specify the use to which I would put the</p> <p>12 data. So even if I would have signed it, it</p> <p>13 would have been a violation of the agreement</p> <p>14 for me to then turn around and use that data</p> <p>15 in this litigation. That document is -- has</p> <p>16 no potential to provide me with permission to</p> <p>17 use that data in this litigation.</p> <p>18 Q. You are aware -- you've been</p> <p>19 assisted by Cornerstone in this case;</p> <p>20 correct?</p> <p>21 A. Yes.</p> <p>22 Q. Are you aware of whether or not</p> <p>23 individuals at Cornerstone signed any</p> <p>24 agreements that allowed them access to NCHS</p>
Page 211	Page 213
<p>1 those documents were?</p> <p>2 A. There was a document that</p> <p>3 appeared to be an agreement between NCHS and</p> <p>4 PIRE for purposes of analyzing restricted-use</p> <p>5 mortality data data for producing descriptive</p> <p>6 statistics for some -- for public consumption</p> <p>7 of some sort.</p> <p>8 Q. And were you presented with an</p> <p>9 opportunity to sign that agreement?</p> <p>10 A. I don't know if I would say I</p> <p>11 was presented with an opportunity to sign it.</p> <p>12 I was shown the document, but I couldn't sign</p> <p>13 it because that wasn't the reason I was going</p> <p>14 to use the NCHS data. So, I mean, it just</p> <p>15 wouldn't make any sense for me to sign it.</p> <p>16 Q. And that's an absolutely fair</p> <p>17 clarification that you made with respect to</p> <p>18 my question.</p> <p>19 You did not sign that agreement</p> <p>20 that you were presented with; correct?</p> <p>21 A. It was an agreement with an</p> <p>22 organization with which I wasn't affiliated</p> <p>23 for purposes of analyzing the data that had</p> <p>24 nothing to do with what I was going to do.</p>	<p>1 restricted mortality data?</p> <p>2 A. I'm not aware of whether they</p> <p>3 signed it or not.</p> <p>4 Q. Do you believe that those</p> <p>5 individuals that have signed the agreement</p> <p>6 are in violation of certain federal laws that</p> <p>7 you say that you are -- would be in danger of</p> <p>8 violating if you had signed that agreement?</p> <p>9 A. I don't know what they did or</p> <p>10 didn't do.</p> <p>11 Q. Turn to --</p> <p>12 A. I can tell you that once I</p> <p>13 figured out that I would not use the data</p> <p>14 because of the reasons that I've outlined --</p> <p>15 it was not immediately clear to me what was</p> <p>16 going on here. But once it became clear, I</p> <p>17 cautioned the Cornerstone people against use</p> <p>18 of the data for the reasons that I've stated</p> <p>19 in my testimony.</p> <p>20 MR. KO: I move to strike that</p> <p>21 response as I didn't have a question</p> <p>22 pending.</p> <p>23 Q. (BY MR. KO) The paragraphs 11</p> <p>24 through 17 of your report also contain and</p>

54 (Pages 210 to 213)

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Page 214	Page 216
<p>1 reflect a summary of your opinions. Is that</p> <p>2 accurate?</p> <p>3 A. Yes.</p> <p>4 THE WITNESS: Could we take a</p> <p>5 short bathroom break?</p> <p>6 MR. KO: Sure, of course.</p> <p>7 THE VIDEOGRAPHER: The time is</p> <p>8 now 2:08. Going off the record.</p> <p>9 (Recess taken, 2:08 p.m. to</p> <p>10 2:16 p.m.)</p> <p>11 THE VIDEOGRAPHER: The time is</p> <p>12 now 2:16. Back on the record.</p> <p>13 Q. (BY MR. KO) Before we broke, I</p> <p>14 was asking you to turn to paragraphs 12</p> <p>15 through 17 of your report.</p> <p>16 Are you there?</p> <p>17 A. Yes.</p> <p>18 Q. And is it fair to say, or</p> <p>19 accurate to say that paragraphs 12 through 17</p> <p>20 contain the summary of the expert opinions</p> <p>21 you are giving in this case separate and</p> <p>22 apart from the NCHS restricted mortality data</p> <p>23 issue?</p> <p>24 A. And the issue of the timing of</p>	<p>1 Q. And with respect to the entry</p> <p>2 you have on the top left-hand corner of this</p> <p>3 roadmap where you indicate Rosenthal and</p> <p>4 McCann, you indicate that that is contained,</p> <p>5 or the analysis that you have in response to</p> <p>6 Rosenthal and McCann is in -- contained in</p> <p>7 the appendix of your report?</p> <p>8 A. Yes.</p> <p>9 Q. And can you describe to me what</p> <p>10 portions of the appendix respond to Rosenthal</p> <p>11 and McCann's analysis?</p> <p>12 A. Well, it's in the appendix that</p> <p>13 I identify the interrelationship between</p> <p>14 Professor Rosenthal and potentially Professor</p> <p>15 Mc- -- Dr. McCann, their reports and</p> <p>16 Professor Cutler's and McGuire's report.</p> <p>17 I don't respond to Professor</p> <p>18 Rosenthal or Professor McCann's reports in</p> <p>19 the sense of critiquing their analysis beyond</p> <p>20 what I have here in the report.</p> <p>21 Q. Sure. Is it fair to say the</p> <p>22 critique -- or is it fair to say that the</p> <p>23 analysis that you focus on on -- for the</p> <p>24 plaintiffs' experts is the analysis or the</p>
Page 215	Page 217
<p>1 plaintiffs' experts' data production</p> <p>2 described in paragraph 7, yes.</p> <p>3 Q. Okay. So paragraphs 12 through</p> <p>4 17 reflect the opinions that -- the summary</p> <p>5 of the expert opinions you are giving in this</p> <p>6 case separate and apart from the NCHS</p> <p>7 restricted mortality data issue and the</p> <p>8 timing of plaintiffs' experts' disclosures in</p> <p>9 this case; correct?</p> <p>10 A. Yes.</p> <p>11 Q. And turn to page 6 in</p> <p>12 paragraphs 12 through 14. Well, actually,</p> <p>13 before we do that, I want to turn to Figure 1</p> <p>14 of your expert report, which is set forth on</p> <p>15 page 5.</p> <p>16 This is a flowchart that you</p> <p>17 prepared that reflects where in your report</p> <p>18 you're responding to certain opinions</p> <p>19 provided by plaintiffs' expert reports;</p> <p>20 correct?</p> <p>21 A. Both the location of my</p> <p>22 responses and my understanding of the flow</p> <p>23 of -- and the interrelationship between</p> <p>24 plaintiffs' experts' reports, yes.</p>	<p>1 analyses of Professor Cutler and Professor</p> <p>2 McGuire?</p> <p>3 A. Professor Cutler, Gruber,</p> <p>4 McGuire, and Keyes.</p> <p>5 Q. With respect to the opinions</p> <p>6 provided by Professor Gruber and Professor</p> <p>7 Keyes, is your -- or are your opinions</p> <p>8 regarding their expert analysis set forth</p> <p>9 in -- or is the summary of your opinions</p> <p>10 regarding their analysis set forth in</p> <p>11 paragraph 16(b)?</p> <p>12 A. Certainly 16(b) does highlight</p> <p>13 some of my concerns with Professor Gruber's</p> <p>14 and Keyes' analysis. I have other concerns</p> <p>15 with Professor Gruber's analyses that are</p> <p>16 outside of paragraph 16(b) that are</p> <p>17 referenced elsewhere in my report.</p> <p>18 Q. Let me ask it this way. Is it</p> <p>19 fair to say that the primary analysis that</p> <p>20 you are critiquing, for purposes of your</p> <p>21 expert report, is the analysis of Professor</p> <p>22 Cutler?</p> <p>23 A. I spend most of the time in my</p> <p>24 report with my concerns about Professor</p>

55 (Pages 214 to 217)

Highly Confidential - Subject to Further Confidentiality Review

Page 218	Page 220
<p>1 Cutler's analysis. If that's responsive to</p> <p>2 your question. But I also have concerns</p> <p>3 about Professor Keyes, Gruber, and McGuire,</p> <p>4 as outlined in my report.</p> <p>5 Q. So is it fair to say that the</p> <p>6 plaintiffs' expert analyses that you are</p> <p>7 critiquing is with regard to Professor</p> <p>8 Cutler, Professor Gruber, Professor Keyes,</p> <p>9 and Professor McGuire?</p> <p>10 Correct?</p> <p>11 A. In this report, I would reserve</p> <p>12 my right to -- reserve the right to examine</p> <p>13 Dr. McCann's analysis and Professor</p> <p>14 Rosenthal's analysis once I've been able to</p> <p>15 understand if Dr. McCann's analysis is</p> <p>16 included at all as part of plaintiffs'</p> <p>17 analysis of damages. And if it is included,</p> <p>18 how so?</p> <p>19 Q. Separate and apart from the</p> <p>20 reservation of rights that you've made clear</p> <p>21 today, within the four corners of this</p> <p>22 particular report that is Exhibit 2 of this</p> <p>23 deposition, is there any critique that you</p> <p>24 have of any expert report outside of</p>	<p>1 of the summary of your opinions; correct?</p> <p>2 A. Yes. This is a summary of</p> <p>3 the -- the summary of the reasons why I have</p> <p>4 the opinion that Professor Cutler's estimates</p> <p>5 of the causal effect of prescription opioid</p> <p>6 shipments on county government activity are</p> <p>7 overstated and unreliable.</p> <p>8 Q. And the basis for all of these</p> <p>9 reasons are contained in your report;</p> <p>10 correct?</p> <p>11 A. Yes, with the exception of the</p> <p>12 possibility of future reports when I learn</p> <p>13 about the source of Professor Cutler's use of</p> <p>14 the distributor defendants' responsibility</p> <p>15 percentages, yes.</p> <p>16 Q. And separate and apart from</p> <p>17 learning about the source of Professor</p> <p>18 Cutler's use of the distributor defendants'</p> <p>19 responsibility percentages, there is nothing</p> <p>20 outside of this report that you need to</p> <p>21 support the opinions set forth in 16(a)</p> <p>22 through (f); correct?</p> <p>23 A. There is nothing I additionally</p> <p>24 need, but it's also true that I reserve the</p>
Page 219	Page 221
<p>1 Professor Cutler, Professor Gruber,</p> <p>2 Professor Keyes, or Professor McGuire?</p> <p>3 A. Not -- nothing over and above</p> <p>4 what I've said in the report.</p> <p>5 Q. So -- okay.</p> <p>6 With respect to Professor</p> <p>7 Cutler's analysis, your critique of his</p> <p>8 report is summarized in paragraph 16. Is</p> <p>9 that fair to say?</p> <p>10 A. Yes.</p> <p>11 Q. And in particular, you indicate</p> <p>12 that Professor Cutler's estimates of the</p> <p>13 causal effect of prescription opioid</p> <p>14 shipments on county government activity are</p> <p>15 overstated and unreliable.</p> <p>16 Is that an accurate reflection</p> <p>17 of the expert testimony or opinions you are</p> <p>18 giving with respect to Professor Cutler's</p> <p>19 expert report?</p> <p>20 A. Yes, that's certainly one</p> <p>21 opinion I'm offering. Yes.</p> <p>22 Q. And you -- and you set forth</p> <p>23 the reasons for why they were overstated and</p> <p>24 unreliable in paragraph 16(a) through 16(f)</p>	<p>1 right to provide further criticism of</p> <p>2 Professor Cutler's method and analysis if and</p> <p>3 when I receive permission to examine the NCHS</p> <p>4 mortality data.</p> <p>5 Q. Okay. So separate -- or</p> <p>6 outside of the source of Professor Cutler's</p> <p>7 use of the distributor defendants'</p> <p>8 responsibility percentages and your belief</p> <p>9 that you need permission from NCHS to review</p> <p>10 the NCHS restricted mortality data, are all</p> <p>11 of the opinions or the bases of your opinions</p> <p>12 that you've set forth with respect to</p> <p>13 Professor Cutler's analysis contained within</p> <p>14 this report?</p> <p>15 A. Yes.</p> <p>16 Q. Okay. And same questions with</p> <p>17 respect to Professor Gruber, McGuire, and</p> <p>18 Keyes. Are all of the bases for your</p> <p>19 opinions regarding their expert analysis</p> <p>20 contained in your report?</p> <p>21 A. With the exception of the two</p> <p>22 topics on which I would reserve the right to</p> <p>23 provide a supplemental report, yes.</p> <p>24 Q. And in paragraph 17 you talk</p>

56 (Pages 218 to 221)

Highly Confidential - Subject to Further Confidentiality Review

Page 222	Page 224
<p>1 about your opinion of Professor McGuire's</p> <p>2 analysis.</p> <p>3 Do you see that?</p> <p>4 A. Yes.</p> <p>5 Q. And you are generally claiming</p> <p>6 that his analysis is flawed because he relies</p> <p>7 on Professor Cutler's overstated and</p> <p>8 unreliable estimates; is that accurate?</p> <p>9 A. Yes.</p> <p>10 Q. And so, in other words, and</p> <p>11 just so I understand your opinion, you are</p> <p>12 reaching the conclusion about Professor</p> <p>13 McGuire's analysis being unreliable because</p> <p>14 he relies on Professor Cutler, which you also</p> <p>15 believe is unreliable; is that correct?</p> <p>16 A. Yes. I conclude that Professor</p> <p>17 McGuire's estimates are overstated and</p> <p>18 unreliable because he relies on Professor</p> <p>19 Cutler's estimates, which are overstated and</p> <p>20 unreliable, yes.</p> <p>21 Q. And you are not performing any</p> <p>22 independent or empirical analysis on</p> <p>23 Professor McGuire's work; correct?</p> <p>24 MR. GEISE: Object to the form.</p>	<p>1 A. Go ahead.</p> <p>2 Q. So let me try to ask you a more</p> <p>3 direct question.</p> <p>4 Are you providing anywhere in</p> <p>5 your report your own estimate or conclusion</p> <p>6 about what costs the bellwethers have</p> <p>7 incurred that are the responsibility of the</p> <p>8 defendants?</p> <p>9 A. No. That -- it was not part of</p> <p>10 my assignment to provide an estimate of the</p> <p>11 costs that the bellwethers have incurred that</p> <p>12 are -- were the responsibility of the</p> <p>13 defendants.</p> <p>14 Q. And are you providing your own</p> <p>15 conclusions regarding the causal effect or</p> <p>16 the percentage for which defendants should be</p> <p>17 liable in this case?</p> <p>18 A. I am not providing a specific</p> <p>19 estimate of the percentage of potential harms</p> <p>20 from opioids that -- for which defendants</p> <p>21 should be liable in this case. That was not</p> <p>22 part of my assignment.</p> <p>23 Q. And with respect to the crime</p> <p>24 regressions that you have, in my terms,</p>
Page 223	Page 225
<p>1 THE WITNESS: I have not --</p> <p>2 yeah, I'm not sure what you mean by</p> <p>3 independent analysis. I'm sorry, I'm</p> <p>4 just not -- I'm not understanding.</p> <p>5 Q. (BY MR. KO) Have you done any</p> <p>6 empirical work in response to Professor</p> <p>7 McGuire's expert report?</p> <p>8 A. Insofar as Professor McGuire</p> <p>9 relies on Professor Cutler's crime</p> <p>10 regressions for -- to support his opinion, I</p> <p>11 have done empirical work.</p> <p>12 Q. Separate and apart from that</p> <p>13 empirical work, which we'll get to in a</p> <p>14 little more detail in a moment, have you done</p> <p>15 any other empirical work regarding Professor</p> <p>16 McGuire's conclusions?</p> <p>17 A. Yes. But do you mean -- do you</p> <p>18 mean work regarding Professor McGuire's</p> <p>19 conclusions that do not depend in any way on</p> <p>20 Professor Cutler?</p> <p>21 I'm sorry, I'm --</p> <p>22 Q. Yeah, let me ask it this way.</p> <p>23 It's a fair -- I understand what you're</p> <p>24 trying to seek clarification on.</p>	<p>1 revised from Cutler, would you fairly</p> <p>2 characterize those as empirical work that</p> <p>3 you've done in this case?</p> <p>4 A. Yes.</p> <p>5 Q. Are there any other regressions</p> <p>6 that you have run or rerun other than the</p> <p>7 crime regressions that are set forth in your</p> <p>8 report?</p> <p>9 A. Do you mean regressions that</p> <p>10 I've run or rerun that form the basis of any</p> <p>11 of my opinions?</p> <p>12 Q. Let's start there, yes.</p> <p>13 A. No.</p> <p>14 Q. So other than the crime</p> <p>15 regression that you have rerun that Professor</p> <p>16 Cutler ran in his report, is it accurate to</p> <p>17 say that you have not run any other</p> <p>18 regressions for purposes of your report?</p> <p>19 A. I have not run any other</p> <p>20 regressions on which I rely in my report.</p> <p>21 Q. Other than the crime</p> <p>22 regressions that you reran for --</p> <p>23 A. Other than the crime</p> <p>24 regressions --</p>

57 (Pages 222 to 225)

Highly Confidential - Subject to Further Confidentiality Review

Page 226	Page 228
<p>1 Q. -- on Professor Cutler's</p> <p>2 report?</p> <p>3 A. Yes. Yes.</p> <p>4 Q. So just to clean it up a little</p> <p>5 bit, so the record is clear, because it's a</p> <p>6 big part of my job.</p> <p>7 So the record is clear, other</p> <p>8 than the crime regressions that you have</p> <p>9 rerun that Professor Cutler ran in his</p> <p>10 report, is it accurate to say that you have</p> <p>11 not run any other regressions for purposes of</p> <p>12 your report that you have relied upon in</p> <p>13 forming the opinions disclosed in your</p> <p>14 report?</p> <p>15 A. Yes.</p> <p>16 Q. I want to turn to the</p> <p>17 section -- section 11 of your report and in</p> <p>18 particular paragraph 132 on page 60.</p> <p>19 Let me know when you get there.</p> <p>20 A. Yes.</p> <p>21 Q. And in paragraph 132, which is</p> <p>22 contained in section 11 of your report,</p> <p>23 titled Conclusion, you identify a series of</p> <p>24 determinants that you claim plaintiffs'</p>	<p>1 By implication, Professor</p> <p>2 McGuire's estimates, because they rely on</p> <p>3 Professor Cutler's estimates, fail to</p> <p>4 incorporate these determinants in his</p> <p>5 analysis.</p> <p>6 That's a -- those are the three</p> <p>7 of plaintiffs' experts who -- where I am</p> <p>8 expressing concern that their damages</p> <p>9 modeling has ignored, discounted, or</p> <p>10 abstracted away from these eight categories</p> <p>11 of determinants.</p> <p>12 Q. So is it fair to say that these</p> <p>13 determinants that you say plaintiffs' experts</p> <p>14 ignore, discounted, or abstracted away from</p> <p>15 are also opinions that you are disclosing in</p> <p>16 this case.</p> <p>17 And actually, that was a poor</p> <p>18 question. Let me ask it again.</p> <p>19 With respect to the</p> <p>20 determinants that you set forth in</p> <p>21 paragraph 132, is it your expert opinion that</p> <p>22 plaintiffs' experts have failed to consider</p> <p>23 and in particular have ignored, discounted,</p> <p>24 or abstracted away from these determinants?</p>
Page 227	Page 229
<p>1 experts have failed to utilize or consider in</p> <p>2 purposes of developing their model. Is that</p> <p>3 accurate?</p> <p>4 A. No. I mean, what I said was</p> <p>5 that Professor Cutler's regression models</p> <p>6 failed to incorporate these determinants.</p> <p>7 That's my opinion.</p> <p>8 Q. Okay. And the determinants</p> <p>9 that you indicate Professor Cutler has</p> <p>10 ignored include the, I believe, eight</p> <p>11 determinants that you list in subparagraphs</p> <p>12 132(a) through (h); correct?</p> <p>13 A. Eight categories of</p> <p>14 determinants that are not included in his</p> <p>15 model, yes.</p> <p>16 Q. Okay. And so are these -- with</p> <p>17 respect to these determinants, are you saying</p> <p>18 that it was just Professor Cutler that failed</p> <p>19 to incorporate these determinants, or are you</p> <p>20 saying other experts also failed to include</p> <p>21 these determinants?</p> <p>22 A. Well, Professor Gruber's</p> <p>23 descriptive statistics also failed to include</p> <p>24 analysis of these determinants.</p>	<p>1 A. Well, I don't know if I would</p> <p>2 use the word "failed to consider." I mean,</p> <p>3 the damages modeling that Professor Cutler</p> <p>4 performs and the descriptive statistics that</p> <p>5 Professor Gruber calculates, and in turn the</p> <p>6 damages calculations that Professor McGuire</p> <p>7 performs, do not incorporate these</p> <p>8 determinants in their analysis.</p> <p>9 Q. And with respect to your</p> <p>10 analysis of the determinant at</p> <p>11 paragraph 132(a), which are sociological</p> <p>12 factors, you indicate that those are</p> <p>13 discussed in paragraph 64(a) of your report;</p> <p>14 is that accurate?</p> <p>15 A. Yes.</p> <p>16 Q. Is there any other portion of</p> <p>17 your report other than what's included in</p> <p>18 paragraph 64(a) that discusses this</p> <p>19 particular determinant?</p> <p>20 A. I think maybe. I'm not sure if</p> <p>21 it's all in 64(a) or not.</p> <p>22 I know that that's one place</p> <p>23 where it's discussed.</p> <p>24 Q. Okay. Well, can you point me</p>

58 (Pages 226 to 229)

Highly Confidential - Subject to Further Confidentiality Review

Page 230	Page 232
<p>1 to other areas in which those determinants</p> <p>2 are discussed in your report and why you</p> <p>3 didn't identify them in paragraph 132(a)?</p> <p>4 A. Well, I mean, paragraph 63</p> <p>5 talks about those determinants also.</p> <p>6 To the extent I didn't cite</p> <p>7 every single paragraph in the conclusion</p> <p>8 paragraph, it was only a matter of, you</p> <p>9 know -- it wasn't intentional, for sure.</p> <p>10 Q. Other than paragraphs 63 and</p> <p>11 64(a), are there any other areas in your</p> <p>12 report where you discuss sociological factors</p> <p>13 determinants that you claim plaintiffs'</p> <p>14 experts ignored?</p> <p>15 A. Well, I mean -- I mean, in part</p> <p>16 those are also part of my concerns about</p> <p>17 Professor Cutler's indirect regression models</p> <p>18 too. So the concerns expressed in paragraphs</p> <p>19 63, 64(a), and then the concluding paragraph</p> <p>20 also apply to some of the concerns that I</p> <p>21 expressed in paragraphs 70 to 76.</p> <p>22 Q. Is there a reason why you</p> <p>23 didn't identify those in paragraph 132(a), or</p> <p>24 here are you just providing illustrative</p>	<p>1 Q. Is it fair to say that these --</p> <p>2 at least with respect to Appendices C, D, and</p> <p>3 E, those are summaries of what you understand</p> <p>4 plaintiffs' expert's damage model consists</p> <p>5 of?</p> <p>6 A. Yes.</p> <p>7 Q. Okay. And so in other words, I</p> <p>8 just want to make sure I understand, that</p> <p>9 with respect to Appendices C, D, and E,</p> <p>10 you're not doing any independent empirical</p> <p>11 analysis of your own but simply summarizing</p> <p>12 Professor Cutler's methodology; correct?</p> <p>13 A. Yes. This is my effort to</p> <p>14 trace back Professor Cutler's damages</p> <p>15 methodology, yes.</p> <p>16 Q. And then appendix F does</p> <p>17 contain the crime regression that you reran</p> <p>18 that we discussed a moment ago; correct?</p> <p>19 A. Yes.</p> <p>20 Q. And so that does contain some</p> <p>21 of the empirical analysis that you performed</p> <p>22 in this case? Or that does reflect the</p> <p>23 empirical analysis that you performed in this</p> <p>24 case; correct?</p>
Page 231	Page 233
<p>1 examples?</p> <p>2 A. Yes. That's a good way to put</p> <p>3 it, that in paragraph 132(a), I was just</p> <p>4 providing an illustrative example. Thank</p> <p>5 you.</p> <p>6 Q. It took until 2:42 for to you</p> <p>7 thank me.</p> <p>8 A. I'm sorry.</p> <p>9 Q. You are going to thank me again</p> <p>10 shortly.</p> <p>11 But same question with respect</p> <p>12 to all the social determinants -- or excuse</p> <p>13 me, all the determinants that you set forth</p> <p>14 in paragraph 132(a) through (h). When you're</p> <p>15 providing your discussion of these</p> <p>16 determinants, are you simply identifying some</p> <p>17 illustrative examples of where they're</p> <p>18 discussed in your report?</p> <p>19 A. Yes. That's accurate.</p> <p>20 Q. Turn with me to Appendices C</p> <p>21 through F, which appear on pages 64 through</p> <p>22 71 of your report.</p> <p>23 And these -- are you there?</p> <p>24 A. Yes. Yes.</p>	<p>1 A. Yes.</p> <p>2 Q. Professor Kessler, are you</p> <p>3 aware of when the trial in this litigation is</p> <p>4 scheduled for?</p> <p>5 A. No.</p> <p>6 Q. Okay. Have you been requested</p> <p>7 to set aside time this fall for potential</p> <p>8 trial testimony in this case?</p> <p>9 A. I believe counsel has mentioned</p> <p>10 this to me. I don't remember any specific</p> <p>11 dates, though.</p> <p>12 Q. Okay. And do you plan -- if</p> <p>13 asked, do you plan on being present at trial</p> <p>14 in this case?</p> <p>15 A. Yes.</p> <p>16 Q. And other than -- well, let me</p> <p>17 ask it this way, to be clean. Because I like</p> <p>18 your words sometimes better than mine, if not</p> <p>19 more often than not.</p> <p>20 But is there anything you plan</p> <p>21 on doing between now and trial, if asked, to</p> <p>22 testify as an expert witness?</p> <p>23 MR. GEISE: Objection. That's</p> <p>24 pretty broad.</p>

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<p style="text-align: right;">Page 234</p> <p>1 THE WITNESS: If -- I mean, 2 certainly I may undertake some of the 3 additional analyses that we've 4 discussed. That would be one 5 possibility. 6 I may prepare some 7 demonstratives that are -- have less 8 small print than the ones -- some of 9 the ones that I've produced in this 10 report. 11 But I have no specific plans at 12 this time for what else I would do. 13 Q. (BY MR. KO) And do you intend 14 to conduct any further research or conduct 15 any empirical analysis in connection with 16 your engagement as an expert in this case? 17 A. Do you mean beyond the areas 18 that I've reserved the right to conduct 19 additional analyses? 20 Q. Yes. 21 A. Yes, certainly beyond those 22 areas, I don't intend to conduct any other 23 analysis for this report, although I am 24 performing ongoing academic research on this</p>	<p style="text-align: right;">Page 236</p> <p>1 investigating? 2 A. No. 3 Q. By the way, have you ever used 4 opioids? 5 A. Yes. 6 Q. Under what circumstances have 7 you used opioids? 8 A. I've used prescription opioids 9 under a doctor's order after medical 10 procedures. 11 Q. And how many times have you 12 been prescribed prescription opioids? 13 A. Maybe three. 14 Q. And can you give me a general 15 understanding of when in your life that 16 was -- that happened to be the case? 17 A. I'm really not comfortable 18 discussing my personal medical history. 19 MR. GEISE: And I understood 20 the question just to be when. I would 21 agree, I don't think you need to get 22 into your personal medical history; 23 but if it's a question about timing, 24 perhaps you can answer time as opposed</p>
<p style="text-align: right;">Page 235</p> <p>1 subject. 2 Q. And that ongoing academic 3 research is related to the working paper -- 4 the manuscript in progress that you were 5 co-authoring with Laurence Baker and Kate 6 Bundorf? 7 A. Yes. 8 Q. Is there any other academic 9 work or ongoing academic work that you 10 currently are doing with respect to opioids 11 or opioid use? 12 A. Yes. 13 Q. Can you describe to me what 14 that consists of? 15 A. That work is very preliminary, 16 so I don't have any results or anything 17 exciting to talk about here today. But it's 18 along the same lines of the Medicare 19 Advantage paper, using claims data to 20 investigate prescriber behavior and insurance 21 markets. 22 Q. Okay. Anything outside of that 23 work that has any relation to opioids that 24 you are currently doing or researching or</p>	<p style="text-align: right;">Page 237</p> <p>1 to why. 2 MR. KO: That's exactly right. 3 MR. GEISE: If you're 4 comfortable with that. 5 Q. (BY MR. KO) I was simply 6 asking, when -- do you recall when -- just so 7 the record is clear, do you recall when you 8 were described prescription opioids? 9 A. Yeah. The last time was 10 probably three years ago, or something like 11 that. 12 Q. And there were two additional 13 times previous to that? 14 A. Yes. 15 Q. For which you were prescribed 16 prescription opioids? 17 A. Yes. 18 Q. Do you recall the duration of 19 the prescription you received in each 20 instance? 21 A. No. 22 Q. Do you have any family or 23 friends that have suffered from any opioid 24 addiction or opioid misuse issues?</p>

60 (Pages 234 to 237)

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<p style="text-align: right;">Page 238</p> <p>1 MR. GEISE: And I would object. 2 I believe this is far outside the 3 scope of his report. Beyond anything 4 he's being offered as an expert on and 5 an invasion of privacy. So I would 6 suggest you don't need to answer that. 7 THE WITNESS: I'm going to 8 follow my counsel's suggestion. 9 MR. KO: Well, I'd note for the 10 record that many of these similar 11 questions were asked of the 12 plaintiffs' experts. 13 So unless you actually do 14 believe it is an invasion of privacy, 15 I ask that you respond. And I do 16 believe it's relevant to this case and 17 it's important for the jury to know. 18 Q. (BY MR. KO) Do you have any 19 family or friends that you know that suffer 20 from an opioid addiction of any kind? 21 MR. GEISE: Same objection, and 22 same admonition. 23 THE WITNESS: I'm going to 24 follow counsel's recommendation and</p>	<p style="text-align: right;">Page 240</p> <p>1 Disclosures, was marked for 2 identification.) 3 Q. (BY MR. KO) Professor Kessler, 4 you have in front of you Exhibits 3 and 4, or 5 what have been marked as Exhibits 3 and 4. 6 And Exhibit 3 is the article we discussed -- 7 we have discussed at various moments today 8 that you coauthored with Laurence Baker and 9 Kate Bundorf; correct? 10 A. Yes. 11 Q. And this is the -- so we're 12 clear, this is the working paper that is also 13 reflected -- this is the working paper that 14 is reflected on page 7 of your CV. The 15 bottom of page 7 in your CV that's titled The 16 Effects of Medicare Advantage on Opioid Use; 17 correct? 18 A. Yes. 19 Q. Now, I just want to turn your 20 attention very quickly to the second 21 paragraph on page 1 of Exhibit 3. 22 You indicate that there's a 23 link to the financial relationships you and 24 your coauthors have that are relevant to this</p>
<p style="text-align: right;">Page 239</p> <p>1 decline to answer. 2 Q. (BY MR. KO) Are you aware of 3 anyone, family or friends or anyone you know 4 personally that has died from an opioid 5 overdose? 6 MR. GEISE: Same objection. 7 Same admonition. 8 THE WITNESS: I'm going to 9 follow counsel's recommendation. 10 Q. (BY MR. KO) I want to hand you 11 really quickly a copy of what we're going to 12 mark as Exhibit 3. 13 (Whereupon, Deposition Exhibit 14 Kessler-3, The Effects of Medicare 15 Advantage on Opioid Use, by Baker, 16 Bundorf, Daniel was marked for 17 identification.) 18 MR. KO: And we'll just do this 19 quickly and mark Exhibit 4 as well 20 because they're related. 21 (Whereupon, Deposition Exhibit 22 Kessler-4, The Effects of Medicare 23 Advantage on Opioid Use, by Baker, 24 Bundorf, Daniel Acknowledgments and</p>	<p style="text-align: right;">Page 241</p> <p>1 particular working paper; is that correct? 2 A. Yes. 3 Q. And there is a link that you 4 disclose in paragraph 2, which is actually 5 what is set forth in Exhibit 4. Is that 6 accurate? 7 A. This looks right. 8 Q. Okay. So Exhibit 4 is the link 9 to the -- the URL link to what you describe 10 in the second paragraph of page 1 of 11 Exhibit 3. Is that right? 12 A. Yes. 13 Q. And on Exhibit 4 there is a 14 disclosure of financial relationships for 15 Daniel Kessler. Do you see that? 16 A. Yes. 17 Q. And it appears -- the -- 18 Exhibit 4 indicates that you have received 19 speaking and consulting fees from insurers, 20 integrated delivery systems and other 21 providers of medical products and services. 22 Did I read that correctly? 23 A. Yes. 24 Q. And is that an accurate</p>

61 (Pages 238 to 241)

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<p style="text-align: right;">Page 242</p> <p>1 reflection and assessment of the types of</p> <p>2 entities that you've received speaking and</p> <p>3 consulting fees from?</p> <p>4 A. Yes.</p> <p>5 Q. And you've also indicate --</p> <p>6 we've gone over your experience with</p> <p>7 Cornerstone, obviously, but you also indicate</p> <p>8 here that you receive grant support from the</p> <p>9 Agency For Healthcare Research and Quality.</p> <p>10 Do you see that?</p> <p>11 A. Yes.</p> <p>12 Q. And how much was the amount of</p> <p>13 that grant support?</p> <p>14 A. From AHRQ. It's a very large</p> <p>15 grant. And I'm a coinvestigator on it.</p> <p>16 It pays only a small part of my</p> <p>17 salary. It does pay for some data and</p> <p>18 research assistance on projects that I'm</p> <p>19 working on.</p> <p>20 I'm not the PI on the grant, so</p> <p>21 I'm not exactly sure of the grant's overall</p> <p>22 magnitude.</p> <p>23 Q. And when you say it supports a</p> <p>24 small part of your salary, what salary are</p>	<p style="text-align: right;">Page 244</p> <p>1 been 2017. I don't know, actually.</p> <p>2 Q. So you -- it's fair to say</p> <p>3 you've been receiving grant support from AHRQ</p> <p>4 for the past three or four years?</p> <p>5 A. At least the past two years.</p> <p>6 At least the past two years.</p> <p>7 Q. And you don't have any</p> <p>8 recollection of what that amount is?</p> <p>9 A. It's a small fraction in</p> <p>10 percentage terms of my Stanford salary. I</p> <p>11 think it's in the ballpark of \$10,000 a year,</p> <p>12 but I don't -- I just don't remember.</p> <p>13 Q. Okay. That's helpful.</p> <p>14 Earlier this afternoon we</p> <p>15 discussed some confidentiality agreements</p> <p>16 that you have entered into with certain</p> <p>17 entities that are defendants in this case.</p> <p>18 Do you recall that?</p> <p>19 A. Yes.</p> <p>20 Q. If ordered by the Court to</p> <p>21 produce those confidentiality agreements,</p> <p>22 would you provide those?</p> <p>23 A. If I -- if I have them and can</p> <p>24 find them and the Court orders me to do</p>
<p style="text-align: right;">Page 243</p> <p>1 you referring to?</p> <p>2 A. My university, my Stanford</p> <p>3 University salary.</p> <p>4 Q. So the grant you receive from</p> <p>5 AHRQ, or the Agency For Healthcare Research</p> <p>6 and Quality, is in connection with the</p> <p>7 compensation you receive as a professor?</p> <p>8 A. Yes.</p> <p>9 Q. And you don't know the exact</p> <p>10 amount that they provide grant support for</p> <p>11 you?</p> <p>12 A. I don't. I believe it was in</p> <p>13 the -- you know, I just don't know. I just</p> <p>14 don't even really know.</p> <p>15 Q. And when did they begin</p> <p>16 providing grant support for you?</p> <p>17 A. I believe we got the AHRQ grant</p> <p>18 in 2016.</p> <p>19 Yeah, I think that was 2016</p> <p>20 that we got it.</p> <p>21 Q. And you've been receiving grant</p> <p>22 support from AHRQ since at least 2016, then?</p> <p>23 Is that your testimony?</p> <p>24 A. I believe it was -- it may have</p>	<p style="text-align: right;">Page 245</p> <p>1 something, then I would certainly consider</p> <p>2 that very seriously.</p> <p>3 Q. And if ordered to testify about</p> <p>4 the nature of those confidentiality</p> <p>5 agreements by the Court, would you be willing</p> <p>6 to do so?</p> <p>7 A. I mean, I guess I'd have to --</p> <p>8 I'd have to consult counsel to determine how</p> <p>9 to handle the conflict between a court order</p> <p>10 and an agreement that I had signed. I just</p> <p>11 don't know what I'd do, but I would certainly</p> <p>12 take a court order very seriously.</p> <p>13 Q. Well, are you aware of whether</p> <p>14 or not any of the confidentiality agreements</p> <p>15 that you signed had provisions in there that</p> <p>16 said unless instructed by a court, you are</p> <p>17 not to disclose the nature of the</p> <p>18 relationship?</p> <p>19 A. I don't remember.</p> <p>20 Q. You don't recall whether or not</p> <p>21 that provision existed or not?</p> <p>22 A. Yeah, I just don't remember.</p> <p>23 Q. Okay.</p> <p>24 MR. KO: Well,</p>

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Page 246	Page 248
<p>1 Professor Kessler, that's all the 2 questions I have for this afternoon. 3 Thank you for your time. 4 MR. GEISE: I have a few 5 questions. I'm happy to keep going. 6 Are you okay to go without a 7 break? Or do you want to take a quick 8 break? 9 THE WITNESS: Yeah, let's take 10 a quick break. 11 THE VIDEOGRAPHER: The time is 12 now 2:58. Going off the record. 13 (Recess taken, 2:59 p m. to 14 3:08 p m.) 15 THE VIDEOGRAPHER: Time is now 16 3:07. Back on the record. 17 CROSS EXAMINATION 18 BY MR. GEISE: 19 Q. Professor Kessler, I wanted to 20 ask you just a few follow-up questions on 21 some things you were asked during your 22 deposition today. 23 First, if I could ask you to 24 turn your attention to paragraph 10 of your</p>	<p>1 recall in terms of signing a fragment from a 2 PIRE agreement regarding restricted-use vital 3 statistics data? 4 MR. KO: Objection, asked and 5 answered. 6 THE WITNESS: I mean, I 7 remember the agreement being with 8 PIRE. I remember the agreement 9 describing the work that was to be 10 governed by it. I remember that the 11 work described to be governed by the 12 agreement being the production of 13 descriptive statistics for public 14 health; or I forget, some kind of 15 public health type organization, but 16 it certainly didn't have anything, any 17 mention of this litigation in it. 18 Q. (BY MR. GEISE) Do you have any 19 other understanding as to whether a 20 Special Master in this litigation has 21 provided any direction that a data use 22 agreement originating with PIRE could be 23 signed for access to the restricted-use data 24 in this case?</p>
Page 247	Page 249
<p>1 expert report which has been marked as 2 Exhibit 2 to your deposition. 3 A. Sure. Go ahead. 4 Q. In the first sentence of 5 paragraph 10, you write: For these reasons I 6 requested from counsel documentation of 7 written approval by NCHS for my analysis of 8 the restricted-use vital statistics data in 9 this litigation. 10 Do you see that? 11 A. Yes. 12 Q. Have you ever been presented a 13 data use agreement from NCHS to use the 14 restricted-use vital statistics data in this 15 litigation? 16 A. No. 17 Q. In one of your answers to a 18 question from Mr. Ko, you mentioned that 19 you've seen a product of a fragment from an 20 agreement with PIRE, P-I-R-E, regarding use 21 of restricted-use data. Do you recall that 22 testimony? 23 A. Yes. 24 Q. Can you tell the jury what you</p>	<p>1 A. I don't know what the 2 Special Master has ordered. Yeah, I just 3 don't know. 4 Q. Can a data use agreement with 5 the NCHS be amended or revised by a signatory 6 to include matters and individuals beyond 7 those granted access by NCHS? 8 MR. KO: Object to the form. 9 Objection, foundation. 10 THE WITNESS: Certainly it's my 11 understanding of data use agreements 12 that they could not be amended without 13 written consent of the agency that 14 initially issued the data use 15 agreement. 16 Q. (BY MR. GEISE) I believe in 17 some of your answers today you've indicated 18 that you have had data use agreements with 19 NCHS for use of restricted-use vital 20 statistics data in the past. 21 Is that accurate? 22 A. No. 23 Q. Have you had data use 24 agreements with -- to use restricted-use</p>

Highly Confidential - Subject to Further Confidentiality Review

<p style="text-align: right;">Page 250</p> <p>1 vital statistics data from NCHS in the past?</p> <p>2 A. No. I haven't had any</p> <p>3 restricted -- I haven't had data use</p> <p>4 agreements with NCHS to use the</p> <p>5 restricted-use vital statistics data. I have</p> <p>6 had agreements with CMS, with the cancer --</p> <p>7 the SEER cancer registry. I've had</p> <p>8 restricted data use agreements with private</p> <p>9 organizations. I've had restricted-use data</p> <p>10 agreements with Medi-Cal.</p> <p>11 Have I had other restricted-use</p> <p>12 data agreements with other countries or other</p> <p>13 federal entities?</p> <p>14 I may have had a restricted-use</p> <p>15 data agreement with the FTC. I can't recall.</p> <p>16 But I've certainly seen many, many of these</p> <p>17 over the years.</p> <p>18 Q. In the circumstances where</p> <p>19 you've had these restricted-use data</p> <p>20 agreements, did you have the ability to use</p> <p>21 that data once you received it for purposes</p> <p>22 other than those indicated in the data use</p> <p>23 agreement?</p> <p>24 A. No.</p>	<p style="text-align: right;">Page 252</p> <p>1 Exhibit 4 to your deposition, which is the</p> <p>2 acknowledgments link related to your working</p> <p>3 paper that you wrote with Laurence Baker and</p> <p>4 Kate Bundorf. Do you have that in front of</p> <p>5 you?</p> <p>6 A. Yes.</p> <p>7 Q. In questioning by Mr. Ko, you</p> <p>8 were read the section of the acknowledgments</p> <p>9 that related to a disclosure of financial</p> <p>10 relationships for Daniel Kessler. Do you see</p> <p>11 that part of Exhibit 4?</p> <p>12 A. Yes.</p> <p>13 Q. At the time of this</p> <p>14 acknowledgment in December of 2018, had your</p> <p>15 expert report in this matter been filed yet?</p> <p>16 A. No.</p> <p>17 Q. As of December of 2018, would</p> <p>18 it have been premature to list your work on</p> <p>19 behalf of Walmart in this matter under your</p> <p>20 disclosure of financial relationships?</p> <p>21 MR. KO: Object to the form.</p> <p>22 THE WITNESS: Well, as you see,</p> <p>23 in this disclosure I don't list any of</p> <p>24 the specific entities except</p>
<p style="text-align: right;">Page 251</p> <p>1 Q. What is your understanding of</p> <p>2 the ramifications that could fall upon you if</p> <p>3 you used them for purposes other than those</p> <p>4 outlined in the data use agreement?</p> <p>5 MR. KO: Object to the form.</p> <p>6 THE WITNESS: Do you mean -- my</p> <p>7 understanding is that's a very serious</p> <p>8 matter and a position I would never</p> <p>9 want to find myself in; because at the</p> <p>10 very least, it's my understanding, for</p> <p>11 example, that CMS could bar me from</p> <p>12 ever using restricted-use federal data</p> <p>13 in the future, which would be very</p> <p>14 harmful to my career. I understand</p> <p>15 there's also the possibility of fines,</p> <p>16 potentially prison, but I -- but also</p> <p>17 ramifications to my institution that</p> <p>18 they would -- they may find Stanford</p> <p>19 to be in violation of data use</p> <p>20 agreements that it has, which would be</p> <p>21 very harmful to my career and the</p> <p>22 university.</p> <p>23 Q. (BY MR. GEISE) Professor</p> <p>24 Kessler, I want to turn your attention now to</p>	<p style="text-align: right;">Page 253</p> <p>1 Cornerstone, where I'm a senior</p> <p>2 advisor with a position and AHRQ. So</p> <p>3 it's consistent with that.</p> <p>4 Q. (BY MR. GEISE) And my question</p> <p>5 is, as of December 2018 there have not been</p> <p>6 any public disclosure of your work on behalf</p> <p>7 of Walmart in this matter; correct?</p> <p>8 A. That is correct.</p> <p>9 Q. One final topic area, Professor</p> <p>10 Kessler. During your examination this</p> <p>11 morning, you were asked about your</p> <p>12 familiarity with certain experts who had been</p> <p>13 designated on behalf of the plaintiffs,</p> <p>14 specifically Professors Gruber, Cutler,</p> <p>15 McGuire, and Liebman. Do you recall that</p> <p>16 discussion?</p> <p>17 A. Yes.</p> <p>18 Q. And I believe you were asked if</p> <p>19 you've reviewed articles and papers that</p> <p>20 those professors have written throughout the</p> <p>21 years. Do you recall that question?</p> <p>22 MR. KO: Objection to the</p> <p>23 extent it mischaracterizes the</p> <p>24 questions that I asked.</p>

64 (Pages 250 to 253)

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<p style="text-align: right;">Page 254</p> <p>1 THE WITNESS: Yeah, I mean I 2 don't recall the questions 3 specifically, but I do recall we 4 discussed Professors Cutler, Gruber, 5 Liebman, and McGuire. 6 Q. (BY MR. GEISE) And I believe 7 you were asked specifically if you respected 8 those other individuals. Do you recall that 9 question? 10 A. Yes. 11 Q. Even if you respect these other 12 individuals, do you always agree with their 13 conclusions in any of their academic work? 14 A. No. I don't always agree with 15 everything Professors Cutler, Gruber, 16 McGuire, and Liebman write. 17 MR. GEISE: I have no further 18 questions. Thank you, 19 Professor Kessler. 20 MR. KO: I have nothing 21 further. 22 THE VIDEOGRAPHER: The time is 23 now 3:17. This concludes the 24 deposition. Going off the record.</p>	<p style="text-align: right;">Page 256</p> <p>1 CERTIFICATE 2 I, DEBRA A DIBBLE, Registered 3 Diplomate Reporter, Certified Realtime 4 Reporter, Certified Realtime Captioner, 5 Certified Court Reporter and Notary Public, 6 do hereby certify that prior to the 7 commencement of the examination, DANIEL P 8 KESSLER, JD, Ph D was duly sworn by me to 9 testify to the truth, the whole truth and 10 nothing but the truth 11 I DO FURTHER CERTIFY that the 12 foregoing is a verbatim transcript of the 13 testimony as taken stenographically by and 14 before me at the time, place and on the date 15 hereinbefore set forth, to the best of my 16 ability 17 18 I DO FURTHER CERTIFY that pursuant 19 to FRCP Rule 30, signature of the witness was 20 not requested by the witness or other party 21 before the conclusion of the deposition 22 I DO FURTHER CERTIFY that I am 23 neither a relative nor employee nor attorney 24 nor counsel of any of the parties to this action, and that I am neither a relative nor employee of such attorney or counsel, and that I am not financially interested in the action DEBRA A DIBBLE, RDR, CRR, CRC NCRA Registered Diplomate Reporter NCRA Certified Realtime Reporter Certified Court Reporter Dated: 29 May 2019</p>
<p style="text-align: right;">Page 255</p> <p>1 (Proceedings recessed at 2 3:19 p.m.) 3 --o0o-- 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24</p>	<p style="text-align: right;">Page 257</p> <p>1 INSTRUCTIONS TO WITNESS 2 3 Please read your deposition over 4 carefully and make any necessary corrections. 5 You should state the reason in the 6 appropriate space on the errata sheet for any 7 corrections that are made. 8 After doing so, please sign the 9 errata sheet and date it. 10 You are signing same subject to 11 the changes you have noted on the errata 12 sheet, which will be attached to your 13 deposition. 14 It is imperative that you return 15 the original errata sheet to the deposing 16 attorney within thirty (30) days of receipt 17 of the deposition transcript by you. If you 18 fail to do so, the deposition transcript may 19 be deemed to be accurate and may be used in 20 court. 21 22 23 24</p>

65 (Pages 254 to 257)

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Page 258		Page 260	
1	ERRATA	1	LAWYER'S NOTES
2	PAGE LINE CHANGE	2	
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4	REASON: _____	4	_____
5		5	_____
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24	REASON: _____	24	_____

Page 259	
1	ACKNOWLEDGMENT OF DEPONENT
2	
3	
4	I, DANIEL P. KESSLER, JD, Ph.D.,
5	do hereby certify that I have read the
6	foregoing pages and that the same is a
7	correct transcription of the answers given by
8	me to the questions therein propounded,
9	except for the corrections or changes in form
10	or substance, if any, noted in the attached
11	Errata Sheet.
12	
13	_____ DANIEL P. KESSLER, JD, Ph.D. DATE
14	
15	Subscribed and sworn to before me this
16	_____ day of _____, 20 ____.
17	My commission expires: _____
18	
19	_____ Notary Public
20	
21	
22	
23	
24	

66 (Pages 258 to 260)